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In The

Supreme Court of the United States

October Term, 1979

No. 79-1990

NORMAN ARCHER,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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In The

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No.

NORMAN ARCHER,

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vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioner, Norman Archer, respectfully prays that this Court will grant a writ of certiorari to review an order of the Court of Appeals of the State of New York rendered the 24th day of April, 1980, which affirmed an order of the New York Supreme Court, Appellate Division, Second Department, *(People v. Archer,* 68 A.D. 2d 441, 417 N.Y.S. 2d 507), which in turn had affirmed a judgment of the Supreme Court of the State of New York, County of New York, convicting the defendant-petitioner of the crimes of bribe receiving and receiving a reward for official misconduct, after trial before Sandler, J., and a jury.

The petitioner was sentenced to 3 years imprisonment, but execution thereof has been stayed throughout the proceedings and at present, until this Court determines whether or not to grant certiorari.

OPINIONS BELOW

The Court of Appeals of the State of New York affirmed the Appellate Division of the Supreme Court of the State of New York upon the opinion of the latter court. The decision and opinion of the Appellate Division is annexed hereto as an appendix. It is also reported in 68 A.D. 2d 441, 417 N.Y.S. 2d 507.

The other opinions germane to this petition are *Matter of Klein (Archer) v. Murtagh*, 44 A.D. 2d 465, *aff'd.*, 34 N.Y. 2d 988, and *United States v. Archer*, 486 F. 2d 670 (2 Cir. 1973).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3). The Court of Appeals of the State of New York affirmed the order of the Appellate Division, Second Department on the 24th day of April, 1980.

QUESTIONS PRESENTED

1. Whether the case at bar presents sufficiently compelling circumstances warranting a bar to the prosecution of the petitioner herein because of police misconduct, irrespective of entrapment, in accordance with the reservations this Court made in the cases of *United States v. Russell*, 411 U.S. 423 and *Hampton v. United States*, 425 U.S. 484?

2. Since the New York courts have sanctioned instigation of crimes by both federal and state agents as a means to investigate unknown and undiscovered criminality in a particular

community of the state, should this conduct be condemned by this Court by removing the incentive for such actions in the future by vacating the conviction of petitioner (*Lee v. Florida*, 392 U.S. 378, 20 L. Ed. 2d 1166)?

(A) This raises the collateral issue of whether, under any circumstances, a federal agent should have been permitted to participate in such illegal activity and to have testified on behalf of the prosecution as to the fruits of such unlawful conduct by the authorities (*Rea v. United States*, 350 U.S. 214, 100 L.Ed. 233)?

3. Whether the New York state trial of petitioner upon identical evidence used for the federal prosecution was barred under the doctrine of collateral estoppel within the purview of *Ashe v. Swenson*, 397 U.S. 436, 25 L. Ed. 2d 469?

4. Whether the post-trial dismissal and reversal by the United States Court of Appeals of petitioner's federal indictment for violating 18 U.S.C. §1952, with intent to violate the New York bribery statutes (Travel Act), upon the grounds that there was insufficient evidence to have warranted the conviction, barred any further prosecution by the State of New York for bribery (*Perrin v. United States*, 100 S. Ct. 311; *Ashe v. Swenson*, 397 U.S. 436, 25 L. Ed. 2d 469)?

5. Whether petitioner's conviction shall be allowed to stand where, concededly, the prosecution had created the subject matter of the crime; supplied all of the ingredients for its commission, and, in the course of participating in this scheme committed the crimes of perjury in a state grand jury; submitting perjurious affidavits to be filed in the courts of record of the State of New York; suborning the commission of perjury in testimony before grand juries; suborning the commission of perjury in affidavits to be filed in court; committing the crime of offering false instruments for filing with a state public official;

committing the crime of forgery; and conspiring to commit the foregoing offenses and to solicit, induce and aid and abet in their commission?

6. Whether the State of New York had the right to again try petitioner for crimes predicated upon the same facts and evidence for which Archer had been convicted in the United States District Court for the Southern District of New York, and upon which facts the United States Court of Appeals for the Second Circuit reversed the conviction and dismissed the indictment because of insufficiency of evidence and prosecutorial misconduct (486 F. 2d 670)?

7. Whether a person, such as Archer, who has been tried and convicted in a federal court on a charge that he violated 18 U.S.C. §1952 by using the means of interstate commerce to facilitate the crime of "bribery in violation of . . . Section 200.00 and 200.10 of the Penal Law of the State of New York", and where such conviction is subsequently *reversed on* appeal by the United States Court of Appeals on the grounds that there was *insufficient evidence* of the use of the means of interstate commerce, can such a person thereafter constitutionally be tried in the State of New York for the same alleged bribery as that charged in the federal indictment? Does the subsequent state prosecution constitute a prosecution for a different "offense"? If so, and if Section 40.20(2)(f) of the Criminal Procedure Law permits such prosecution, is that statute valid and constitutional in view of a claim of double jeopardy and collateral estoppel?

8. Whether, in the circumstances of the preceding question, has the earlier federal prosecution been "terminated" by the appellate court order reversing the conviction, within the meaning of the Criminal Procedure Law statute in New York [Section 40.20(2)(f)]?

9. Whether an exploratory invasion of the criminal justice system of the County of Queens, State of New York, by federal

and state officials who invent crimes to test that system, be encouraged and approved by permitting these officials to retain petitioner's conviction, which was engineered by this illegality?

10. Whether the determination by the United States Court of Appeals for the Second Circuit conclusively terminated the prosecution so that no further prosecution upon the same facts was permissible [486 F. 2d 670 (2 Cir. 1973)]?

11. Whether petitioner was deprived of a speedy trial?

12. Whether this Court should order a dismissal of the charges and indictment herein as a matter of fundamental fairness and due process of law?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth, Fifth, Sixth and Fourteenth Amendments of the United States Constitution are involved herein, as are 18 U.S.C. §1952, Sections 200.00 and 200.10 of the Penal Law of the State of New York, and Section 40.20(2)(f), Criminal Procedure Law.

INTRODUCTORY

The case at bar stands as a hallmark in the annals of perfidy and lawlessness by law enforcement officials who arrogated to themselves any means they chose to employ for the purpose of achieving an end of determining how well the criminal justice system in Queens County, New York was operating.

Concededly, state and federal officials embarked upon an exploratory excursion into the County of Queens, without the slightest notion of what they were investigating, other than an abstract desire to determine whether, in their opinion, criminal

justice in Queens County was on the right tracks. In essence, they threw a "net" into the sea to determine whether they would come up with anything.

These officials, without any judicial fiat whatsoever, procured one Sante A. Bario, an agent of the Federal Bureau of Narcotics and Dangerous Drugs, to pose as a Las Vegas gangster who was carrying a loaded gun in a restaurant in Queens County by pre-arrangement and procured himself to be arrested by a New York City police officer, also conscripted for this ruse (Vincent Murano), so that a charade could be promulgated in the County of Queens by processing this fake arrest through the courts of Queens to determine whether or not ultimately these officials might uncover some corruption. They had not the slightest notion of what, if anything, they would ever find. Indeed, if Archer had not been arrested, together with the co-defendants herein, the Government would have perpetrated an absolute and despicable fraud and excursion into illegality upon the State of New York and upon the United States.

It was obvious that they had no intention of ever informing anyone of what was being done, since the whole purpose of their excursion was to keep everyone in the dark.

An allegation that Chief Judge Fuld of the New York Court of Appeals was informed is totally misleading, since, concededly, he was merely told that something was going on in Queens, and his approval was neither requested nor given.

After filing false affidavits; testifying falsely before state grand juries; committing forgery, conspiracy, filing false documents with the courts of New York, and so forth, the police officials finally blundered upon the *Archer* case, so to speak.

The United States Court of Appeals in reversing the conviction in the federal court based upon these facts which are identical in the state prosecution, was motivated to proclaim (486 F. 2d at 672-673):

> "We do not at all share the Government's pride in its achievement of causing the bribery of a state assistant district attorney by a scheme which involved lying to New York police officers and perjury before New York judges and grand jurors; to our minds the participants' attempt to set up a federal crime for which these defendants stand convicted went beyond any proper prosecutorial role. . . ."

The court also said:

> "We are not sure how we would decide this question if decision were required. Our intuition inclines us to the belief that this case would call for application of Mr. Justice Brandeis' observation in *Olmstead*. Even though that view has not been incorporated in the entrapment defense, there is certainly a limit to allowing governmental involvement in crime. It would be unthinkable, for example, to permit government agents to instigate robberies and beatings merely to gather evidence to convict other members of a gang of hoodlums. Governmental 'investigation' involving participation in activities that result in injury to the rights of its citizens is a course that courts should be extremely reluctant to sanction. (pp. 676-77).

* * *

> Since we conclude reversal to be required on another ground, we leave the resolution of this difficult question for another day. We hope, however, that the lesson of this case may obviate the necessity for such a decision on our part." (p. 677).

Although the Court of Appeals for the Second Circuit found it unnecessary to reach the question, we are obliged to ask that the question be resolved by this Court, in the event the Court rejects our arguments based upon double jeopardy. (Prosecutor Nadjari has made such a decision vital by the subsequent instant prosecution.)

It must be borne in mind that the United States Court of Appeals for the Second Circuit, in its opinion, found the following facts to have been adduced, which facts are identical to those adduced in the state trial, since it is not disputed that the evidence in both the federal and state trials are identical. Thus, the Court of Appeals, Second Circuit, found (*id.* 486 F. 2d at 672-673):

> "Pursuant to the scheme, Taylor gave Bario two loaded pistols, a fake Nevada driver's license, and a *false immigration card* issued by the Immigration and Naturalization Service in Washington at the request of the Director of the BNDD. The next morning Murano effected the staged arrest at a diner in Queens. Murano then took Bario to a precinct house and filed a complaint and *arrest affidavit falsely charging him* with the unauthorized possession of loaded weapons. *Bario, in turn lied about his name, his address, his marital status and his employment, produced the false Nevada driver's license and immigration card, and then certified to the correctness of the false report he had made.* When a police officer of the precinct became suspicious about the immigration card, *Bario had Murano call Taylor so that the latter could arrange for appropriate falsification of records in the Immigration and Naturalization Service in Washington.* Subsequent to arraignment in Queens County Criminal Court, at which *Bario lied about his identity,* he was admitted to bail. A

> special agent of the Bureau of Narcotics, posing as Bario's father, 'C. Barone,' subsequently posted Bario's bail, which had been set at $5,000. After three adjournments, a preliminary hearing was waived and the case was forwarded for presentation to the grand jury" (emphasis added).

The court also observed that Murano testified as to the details of the arrest before the grand jury, and that Bario was then called and "told his contrived tale . . ." (p. 674).

The Previous Prosecution

In or about July, 1972, an indictment was filed in the United States District Court for the Southern District of New York bearing the title, "United States of America against Norman Archer, Frank R. Klein and Leon Wasserberger, Defendants," and bearing the file number "72 Cr. 849."

The two-count federal indictment charged the defendants with a violation of, and a conspiracy to violate, Title 18 U.S.C. §1952, also known as the Travel Act. In substance, the Travel Act penalizes the use of any facility in interstate or foreign commerce to promote any "unlawful activity." The term "unlawful activity" is defined to include "bribery . . . in violation of the laws of the State in which committed . . . " The federal indictment is reproduced at pages 60 through 68 of the record on appeal.

Count Two of the federal indictment alleged that from April 19, 1972 through May 10, 1972 the defendants had violated Section 1952 by using the facilities of interstate and foreign commerce (the telephone) to facilitate the crime of "bribery in violation of . . . Section 200.00 and 200.10 of the Penal Law of the State of New York . . . "

Count One of the federal indictment (the conspiracy count)

charged that defendants conspired to violate Section 1952 commencing on or about April 19, 1972, and alleged:

(a) that Norman Archer was an Assistant District Attorney and Chief of the Indictment Bureau in the Office of District Attorney for the County of Queens (par. 2);

(b) that defendant Klein was an attorney practicing in Queens, New York (par. 3);

(c) that defendant Wasserberger was a bail bondsman's associate in New York County (par. 4);

(d) that a federal agent, acting in an undercover capacity under the name "Salvatore Barone," had been caused to be arrested by a New York City Police patrolman on February 29, 1972 for unlawful possession of pistols (par. 1);

(e) that criminal charges were lodged against Barone and that his case was referred to a grand jury (pars. 2 and 3);

(f) that defendant Wasserberger introduced Barone to defendant Klein who was retained to obtain the dismissal of the charges against Barone by corrupt means (par. 6-a);

(g) that Barone was to pay $15,000, on the understanding that Barone's case would be fixed at the grand jury stage by the Assistant District Attorney in charge of the Indictment Bureau in the Office of the District Attorney for Queens County (par. 6-b);

(h) that Barone paid Klein and Wasserberger a total of $500 on April 19, 1972 (par. 6-c);

(i) that the defendants fabricated and provided to Barone a false story for Barone to tell before the Queens County grand jury (par. 6-3);

(j) that Barone paid an additional $14,500 on May 8, 1972 (par. 6-f);

(k) that petitioner Archer permitted Barone to testify falsely before the grand jury on May 9, 1972 (par. 6-g);

(l) that petitioner Archer received a portion of the $15,000 on May 10, 1972 (par. 6-h).

Count One of the federal indictment also alleged thirteen overt acts. Overt Acts 4, 5 and 7 referred to telephone calls. Other alleged overt acts included

(a) the receipt by Klein of $185 from Barone on April 19, 1972 (Overt Act 2);

(b) the receipt by Wasserberger of $315 from Barone on April 19, 1972 (Overt Act 3);

(c) the receipt by Klein of $14,500 from Barone on May 8, 1972 (Overt Act 9);

(d) the questioning of Barone by Archer before the grand jury on May 9, 1972 (Overt Act 11);

(e) the writing of a letter by Archer to Klein on May 10, 1972 (Overt Act 12);

(f) the receipt by Archer of a portion of the $14,500 on May 10, 1972 (Overt Act 13).

The trial upon the federal indictment took place in January, 1973. On January 29, 1973 a verdict of guilty on both counts

was rendered against all defendants. Judgment of conviction was entered against petitioner on March 14, 1973.

Petitioner appealed to the United States Court of Appeals for the Second Circuit. On or about July 12, 1973 the Court of Appeals in an opinion by Honorable Henry J. Friendly, joined in by Judges Wilfred Feinberg and Walter R. Mansfield, reversed the conviction and remanded the case to the District Court with instructions to dismiss the indictment.

The court's instructions to dismiss the indictment were based upon its conclusion that the Government had failed to carry its burden of proving the crimes charged. The court said (R92),

> "The convictions are reversed for *insufficiency of the evidence* to show a violation of, or a conspiracy to violate, the Travel Act, with instructions to dismiss the indictment." (Emphasis added.)

As we have already indicated, the opinion of the United States Court of Appeals is reproduced at 486 F. 2d 670 (2 Cir. 1973).

Although the federal prosecutors sought a rehearing in the United States Court of Appeals, that rehearing was denied. A brief *amicus curiae* was submitted in support of the position of the United States Government in the initial prosecution of Archer and the others. One of those participating in the *amicus* brief was Maurice Nadjari, Esq., the state prosecutor who subsequently launched the instant prosecution against Archer and the others upon identical grounds which had been the subject of the original prosecution.

Significantly, there was no attempt by the federal prosecutors to seek certiorari in the Supreme Court of the

United States from the decision and opinion of the United States Court of Appeals in the Archer case.

The Present Indictment

The instant indictment contains five counts. The first count charges that defendants, commencing April 19, 1972, conspired to engage in conduct constituting the crimes of bribery and bribe receiving. The second count charges defendants with commission of the crime of bribery between April 19, 1972 and June 16, 1972. The third count charges that defendants committed the crime of bribe receiving in the same period. The fourth and fifth counts charge that defendants committed the crimes of rewarding official misconduct and receiving reward for official misconduct. The present indictment is reproduced at pages 52 through 59 of the record on appeal.

The first count of the instant indictment, which charges conspiracy, contains the fullest description of the alleged facts on which the indictment is based. Defendants are described in the first count in the same way as they were described in the federal indictment; that is, they are described as a Queens Assistant District Attorney in charge of the Indictment Bureau, a Queens attorney and a New York County bail bondsman. The first count also alleges that at the time of the conspiracy,

> ". . . a federal undercover agent, posing under the name of Salvatore Barone, had been arrested and charged with possession of two pistols in Queens County."

It is charged that defendants planned to "obtain the dismissal of the criminal charges against Barone by commission of the crimes of bribery and bribe receiving . . . " It is alleged that defendants did "obtain $15,000 from Barone for having the criminal charges pending against Barone dismissed . . . " It is alleged that defendants "would concoct a fabricated story which Barone would tell the Grand Jury."

Eleven overt acts are alleged in the first count. They include

(a) the receipt by Klein of $185 on April 19, 1972 (Overt Act 1);

(b) the receipt by Wasserberger of $315 on April 19, 1972 (Overt Act 2);

(c) the receipt by Klein of $14,500 on May 8, 1972 (Overt Act 3);

(d) the presentation by Archer of the Barone case to the grand jury on May 9, 1972, and various events which took place during such presentation (Overt Acts 6, 7, 8 and 9);

(e) the writing of a letter by Archer to Klein on May 10, 1972 (Overt Act 10);

(f) the receipt by Archer of a portion of the $14,500 (Overt Act 11).

The second through fifth counts of the present indictment seem to deal with the same events as are referred to in the first count. All of those counts allege that defendants Klein and Wasserberger gave money to petitioner Archer, and that Archer accepted it, with the intent that Archer's conduct in the presentation of the case of *People v. Barone* be influenced.

THE EVIDENCE

Prosecutorial and Governmental Law-Breaking

The evidence adduced at both the federal and state prosecutions are substantially identical since the same witnesses and same testimony were used in both prosecutions.

The true name of the undercover agent whose conduct was so central to this case is Sante A. Bario. He was an agent assigned to the Bureau of Narcotics and Dangerous Drugs ("BNDD"), a division of the Justice Department. His first appearance in the scenario which was staged by the Government[1] in hopes of catching unidentified criminals was as an underworld figure named "Salvatore Barone" or "Sam Barone."

The script which was to govern the activities of Bario which led to his introduction to Klein, and ultimately to the conviction herein, was agreed on among Government officials in February of 1972, *months before it was known that Klein and the other defendants would become targets of the investigation* (170-180).

One day in February 1972, Bario and Vincent Murano, a New York City police officer, met with Messrs. Edward M. Shaw and Nicholas Scopetta, both Assistant United States Attorneys for the Southern District of New York, and with Mr. Thomas Taylor, a Regional Director of BNDD.[2] At that meeting, the details of Bario's staged arrest by Murano, which was to take place on February 29, were agreed on.[3] It was part of the plan discussed among Shaw, Scopetta, Taylor, Bario and Murano that Bario and Murano were to create a situation where charges would be lodged against Bario. These Government officials intended to see whether it would be possible to catch someone attempting to "fix" the case against Bario. Bario so testified almost in so many words:

---

1. The word "Government" is used generally and refers to the combined action of state and federal officials.

2. Other agents of BBDD, the U.S. Attorney's office and the Police Department who were present were men named Vopat, Weiser, Carros and Volmer.

3. The plans were approved by the Police Commissioner of New York City who cooperated fully and assigned Officer Murano as a key member of the *dramatis personae*.

"Q. When the phony arrest was staged at the Omaha Diner it was done pursuant to a plan or strategy under the instructions of your superior? You told us that yesterday. A. Correct.

* * *

Q. Did you know who it was then who eventually you would be testifying against? A. No, sir.

Q. All of the steps in connection with that arrest, the handcuffs, the sending of the three squad cars, the setting up of the bail, they were all steps to get evidence for a prosecution, weren't they? A. I cannot say yes or no, sir. Those were steps taken to create that particular situation. We did not know what would happen from then on, sir.

Q. That is a good way to express it. *To create a particular situation without knowing who would be caught in the net, isn't that correct?* A. *That's right. That's correct.*

Q. *And you participated in the creation of that plan pursuant to the instructions and directions of your superior officers?* A. Yes—I did" (170-180).

On February 28, Taylor of BNDD gave Bario the pistols which were to be found in his possession and authorized him to carry them. On the morning of February 29, the staged arrest of Bario by Murano took place at the Omaha Diner in Queens. Bario was taken to a precinct house, where Murano told a desk sergeant that Bario had been in possession of unauthorized weapons. Bario conceded that that was not true, and that it is a

crime to give a false report to a police officer. Bario also conceded that he lied when he told a lieutenant at the 110th Precinct that his name was Barone.

As part of the arrest procedure, Murano filed a complaint and an arrest affidavit which were deliberately false nearly from beginning to end. Bario took the position that lying under oath and filing false reports were permissible because it had been authorized by his superiors in the U.S. Attorney's office and in the Justice Department. He gave this testimony in substance:

> "Q. Is that statement, sir, in the form of a complaint, a false statement? A. It is not a false statement, sir. Patrolman Murano, as far as I was concerned, *was carrying on plans which he was ordered to carry on by his superiors*. [Emphasis added.]
>
> * * *
>
> Q. Will you answer that, please? Based upon the plan you and Murano felt that you had a right to make false statements, is that right? A. I followed orders, yes sir."

Murano's position was much the same. He testified as follows:

> "Q. The information you filled out on these reports was not true, was it? A. No.
>
> Q. And you filled out false answers to those questions based upon the instructions you received from Mr. Shaw and Mr. Scopetta, isn't that right? A. Yes.
>
> * * *

> Q. When you signed this complaint, sir, Vincent Murano, did you know that there were items within the complaint that weren't true? A. Yes, sir.
>
> Q. And did you sign that complaint at the direction of Mr. Scopetta and Mr. Shaw? A. Yes, sir" (165-185).

Bario was then taken through the normal arrest process. He was asked for information for purposes of a probation report. He gave deliberately false information as to his name, his address, his marital status and his employment status. He also produced false identification consisting of a false Nevada driver's license and a false immigration card. After the probation report was filled out, he signed a false certification as to its correctness. All this was done, he said, "in accordance with [his] instructions."

A false immigration card had been issued to Bario by the Bureau of Immigration and Naturalization at the request of the Director of the Federal Bureau of Narcotics. At the 110th Precinct, a police officer who was not part of the scheme became suspicious of the immigration card and decided to double check. Bario had Murano call Taylor, so that Taylor could have the Immigration Bureau in Washington falsify federal records which would back up the information on the card.

Bario's case was called several times in the Queens Criminal Court. Bail was fixed, and several adjournments were obtained. In the course of his court appearance at the time bail was fixed, Bario lied about his identity to a Queens Criminal Court judge in open court; he did so "under orders." Bail was fixed at $5,000. A BNDD agent named Charles Vopat appeared in court, identified himself as "C. Barone," posted the bail, and then filled out and filed a bail receipt containing false information; he also was "following orders."

All of the foregoing events took place well before Bario met any of the defendants in this case.

On or about April 19, 1972, Bario was introduced to defendant Wasserberger by an informer named De Stefano. Wasserberger introduced Bario to Klein. Bario repeatedly told Klein that he could not afford to go to trial upon the charges against him, and in fact could not even afford to appear in a court room. He had orders from his superiors to make these statements. In a series of meetings with Bario, defendants Wasserberger and Klein indicated that perhaps the grand jury, to which Bario's case had been referred, could be persuaded not to indict. They indicated that they knew the Queens County Assistant District Attorney who would present the case to the grand jury. They indicated that the process of avoiding an indictment would cost Bario a good deal of money.

They told Bario that he would have to have a story to tell the grand jury to explain his possession of the two pistols. Wasserberger, Klein and Bario then devised a story. Bario was to say that he, in fact, had a license in Nevada to carry one of the pistols. As to the other pistol, he was to say that he was asked by a friend to hold the pistol over night, so that the friend could avoid upsetting a young woman with whom he had a date. Bario was to explain that it was necessary for him to carry a weapon since he was a "junket" manager for a Las Vegas casino, and often carried large sums of money.

There is no dispute that this tale was utterly false from start to finish, and that no judicial officer approved this charade.[4]

The day came when Bario's case was to be presented to the grand jury by Assistant District Attorney Norman Archer.

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4. The prosecution alleged they had mentioned their general plan to then Chief Judge Fuld when the U.S. Attorney (Whitney North Seymour) visited him. There is *no claim* or indication that Judge Fuld's approval was either sought or given.

Murano testified first, and told lies under oath concerning the arrest. At the trial below, he made it very clear that he had been told to tell lies under oath by two Assistant United States Attorneys for the Southern District of New York:

> "Q. Did you meet with Mr. Scopetta and he or Mr. Shaw before you testified before the grand jury in Queens County? A. Yes, I did.
>
> Q. And did you have a discussion with them? A. Yes, I did.
>
> Q. One thing they told you was to make sure that you made your testimony good over there, isn't that right? A. Yes, sir."
>
> * * *
>
> Q. Even if you made up facts, isn't that right? A. That's right.
>
> Q. And that is what Mr. Scopetta and Mr. Shaw told you, right? A. Yes, sir."
>
> * * *
>
> Q. Did you discuss with Mr. Shaw and Mr. Scopetta your testimony before the grand jury, including the parts that were false? A. Yes.
>
> Q. You knew that you were going to testify before that grand jury the next day and you were going to answer questions that weren't true, isn't that right? A. That's right.
>
> Q. Even though you were under oath? A. That's right.
>
> * * *

> Q. Did Mr. Shaw and Mr. Scopetta tell you, notwithstanding the fact that you were taking an oath in that grand jury, to answer questions in a certain way, yes or no? A. Yes.
>
> Q. And did you follow their instructions in answering questions with answers that weren't true? . . . A. Yes, sir."[5] (669).

Bario then took the stand.[6] While under oath, he told the Queens County Grand Jury the false story that had been concocted among himself, Wasserberger and Klein. Prior to his testimony, Bario's superiors knew that he was scheduled to testify before the grand jury, knew that he was going to tell the untrue story, and "authorized" him to tell it. Bario so testified:

> "Q. Were you authorized by anyone to give the answers to these questions in this form? A. Yes, sir, I was authorized to go along with plans made by Wasserberger, Klein, and whoever else was involved, that I did not know until it was disclosed to me that it was the chief assistant D.A. in charge of the grand jury, and I was told to go along with plans formulated by them.
>
> Q. Mr. Bario, were you told to testify in the grand jury by your superiors? A. Surely, that also.
>
> * * *
>
> Q. Did your superiors know prior to the time you appeared at the grand jury that morning

5. Murano also testified that his perjury had been committed with the knowledge and approval of the Police Commissioner of the City of New York.

6. Bario had earlier signed and filed a waiver of immunity containing false statements.

what your story to that grand jury was going to be? A. Yes, sir, they knew.

Q. And did they know you were going to go before that grand jury and tell that story? A. Yes, they knew."

The grand jury voted no true bill. Weeks earlier Bario had given Klein several hundred dollars as a down payment. After the grand jury appearances, Bario gave Klein the remainder of the $15,000 which had been requested of him. A portion of this money ($500) was later found by investigators in Archer's house; and in a safe deposit box of Klein's, in the course of searches undertaken pursuant to search warrants.

It must be borne in mind that this prosecution originated from a federal prosecution, which was ultimately reversed and dismissed by the United States Court of Appeals for the Second Circuit, upon insufficient evidence.

While we submit that 18 U.S.C. §1952 (the Travel Act) necessarily contemplated the crime of bribery under New York law, we think it is significant to show the pattern of misbehavior and falsity on the part of the prosecutorial agents when we recall that in the initial prosecution agent Bario admitted that he had made three contrived phone calls on an interstate basis in order to contrive jurisdiction.

We believe this is consistent with the pattern of conduct and lawlessness which pervaded this entire litigation on the part of the prosecution and law enforcement authorities of both the state and federal government.

REASONS FOR GRANTING THE WRIT

I.

THE INSTANT PROSECUTION WAS BARRED UNDER THE DOUBLE JEOPARDY PROVISIONS OF THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION. THE STATE INDICTMENT CHARGED THE "SAME OFFENSE" AS THAT ALLEGED IN THE EARLIER FEDERAL INDICTMENT.

The Fifth Amendment to the United States Constitution provides in pertinent part:

> ". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . ."

In the case at bar it has never been disputed by the prosecution that the same evidence was used in the state trial to convict Archer, as that which was used in his federal prosecution.

The opinion of the United States Court of Appeals for the Second Circuit reveals, unmistakably, that irrespective of any other consideration, the evidence adduced at the federal trial was insufficient to have warranted a conviction. It was clearly, therefore, a determination of insufficiency of evidence that warranted the reversal and dismissal of the indictment in the federal court, and not some technical legal principle.

Had the evidence been sufficient, the federal court would have had proper jurisdiction and a conviction would have stood.

It must also be borne in mind that *Archer went through an entire federal trial, was sentenced, and then had to go through a*

full-blown appeal before his ultimate victory was achieved. The subsequent prosecution by the State of New York was an obvious attempt to evade the double jeopardy doctrines which this Court has handed down in recent years (*Ashe v. Swenson,* 397 U.S. 436, 25 L. Ed. 2d 469 and *Burks v. United States,* 437 U.S. 1, 57 L. Ed. 2d 1).[7]

It is obvious that the sole purpose for the prosecution by the State Special Prosecutor Maurice Nadjari, was to afford the Joint Task Force which had originally prosecuted Archer a second opportunity to supply evidence sufficient to convict him, which it failed to muster during the original prosecution.

This Court is asked to recognize that the cases against Archer have been pending almost ten years. It was recognized by this Court, in such cases as *Illinois v. Somerville,* 410 U.S. 458, 35 L. Ed. 2d 425, that a second prosecution may be grossly unfair. It increases the financial and emotional burden on the accused, prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing, and may even enhance the risk that an innocent defendant may be convicted. The danger of such unfairness to a defendant exists whenever a trial is either aborted or when, in the case at bar, it is declared that no trial ever took place despite the fact that an entire trial occurred and an entire appeal was pursued.

In the case at bar, the theory of the prosecutor in the state case, that is the one under review at the present time, is that the federal prosecution and appeal should be viewed as never having occurred. They have successfully argued in the state courts that because of the fact that the United States Court of Appeals ultimately declared that there was insufficient evidence to have indicted under the Travel Act, that this meant that a new prosecution under state law could proceed as if nothing had ever occurred in the federal court.

7. The state cooperated fully in the federal investigation and prosecution, so it can scarcely argue that it was prosecuting in good faith when the federal case was reversed.

This is a manifest fallacy and, indeed, we maintain violates the provisions of the Eighth Amendment of the United States Constitution because of the harassment that is involved, let alone the clear import of such a determination.

As we have already indicated, the United States Court of Appeals had held that the *evidence* was insufficient to have warranted the prosecution, and not some other legal impediment.

In *Burks v. United States,* 437 U.S. 1 (1978), the Supreme Court of the United States held that the Double Jeopardy Clause precluded a second trial once a reviewing court found that the evidence was insufficient to sustain a jury's verdict of guilty.

The Supreme Court distinguished reversals based on sufficiency of evidence and those based on trial error.

In the *Archer* case in the federal court, the United States Court of Appeals held, in essence, that the evidence was insufficient to sustain a violation of 18 U.S.C. §1952. Had there been, for example, proper interstate jurisdiction and not contrived jurisdiction, the evidence would have been sufficient in the federal court. Thus, the determination of the United States Court of Appeals was that there was insufficient evidence and not that a trial error occurred. Under the holding, therefore, of the Double Jeopardy Clause, it is now impermissible to prosecute the defendant in the case at bar.

Moreover, it should be noted that in *Christ v. Bretz,* 437 U.S. 28 (1978), the Supreme Court held that the federal rule that jeopardy attaches when a jury is empaneled and sworn, is an integral part of the guarantee against double jeopardy and is binding on the states through the Fourteenth Amendment.

It should also be noted that the prosecution is not permitted to use "cute" theories in order to indict seriatim for substantially the same charges.

In *United States v. Ruigomez*, 576 F. 2d 1149 (5 Cir. 1978), the United States Court of Appeals held that it is irrelevant whether a particular transaction is different than another particular transaction. As long as they are both within the ambit of the overall offense, they are barred under the double jeopardy principle from seriatim trials.

In a series of cases, state courts have condemned seriatim prosecutions based upon substantially similar transactions, and have ruled that the Double Jeopardy Clause of the Constitution precludes prosecutions in state courts where a federal court has either convicted or acquitted a defendant, or where "underlying considerations of fairness" are involved [*State v. Gregory*, 333 A. 2d 257 (N.J. 1975); *State v. Hogg*, 118 A. 2d 262 (N.H. April 25, 1978); *People v. Cooper*, 247 N.W. 2d 866 (Mich. 1976); *Commonwealth v. Cepulonis*, 373 N.E. 2d 1136 (Mass. 1978) and *State v. Tanton*, 540 P. 2d 813 (N.M. 1975)].

The foregoing cases all indicate that reprosecution under the same general facts is prohibited where there has been either a conviction or an acquittal in a state court, or the federal court, as the case may be.

In the case at bar, for all intents and purposes, there was a full trial and appeal and the Court of Appeals threw out the case on the basis of insufficiency of evidence.

It is elementary, of course, that the Double Jeopardy Clause of the Federal Constitution is binding on the states and that, at the very minimum, federal standards apply (*Benton v. Maryland*, 395 U.S. 784; *Ashe v. Swenson*, 397 U.S. 436; *Turner v. Arkansas*, 407 U.S. 366 and *Green v. United States*, 355 U.S. 184).

We also submit that the Travel Act under which the defendant-petitioner was indicted by the federal court could not exist in a vacuum, but could only be brought predicated upon

the allegation that the petitioner engaged in the state crime of bribery. (*See Perrin v. United States*, 100 S. Ct. 311.)

In the *Perrin* case this Court recognized that the Travel Act necessarily involved travelling or using a facility of interstate commerce to commit a violation of the laws of a state and in the particular case there, as in the case at bar, the crime involved was "bribery".

In the instant case we must bear in mind that the Government sought to prove that Archer had committed the crime of bribery in violation of the laws of the State of New York in order to prove a violation of the Travel Act. In holding that the evidence was insufficient, the United States Court of Appeals for the Second Circuit necessarily found that there was a factual insufficiency in the evidence, and not some trial error, which caused it to reverse and dismiss. This is clearly within the purview of the *Burks* case, *supra.*

A. The "two sovereignties" doctrine is not applicable herein.

Perhaps the state will again urge in the case at bar that double prosecution is permissible herein under the so-called "two sovereignties" doctrine announced in *Bartkus v. Illinois*, 359 U.S. 121. We submit that the *Bartkus* rule is no longer viable. (*See Christ v. Bretz, supra; Burks v. United States, supra;* and *Sanabria v. United States*, 437 U.S. 54.)

Assuming, however, that *Bartkus* is still good law, nevertheless it does not apply in this case. The majority opinion in *Bartkus* itself recognizes an exception to the "two sovereignties" doctrine under which a prosecution by one jurisdiction is barred where the defendant has previously been tried for a violation of the same statute, even though in *another jurisdiction (see United States v. Dinitz, supra; People v. Abbamonte, supra).*

Recognizing the bar to prosecution arising from these circumstances, the *Bartkus* Court cited *Houston v. Moore,* 5 Wheat. 1 (1820). In *Houston,* the defendant had been convicted by a state court-martial for having failed to report for state militia duty pursuant to a request of the President of the United States, and in violation of a federal statute. A state statute made such failure to report criminal, incorporating the federal statute by reference. The conviction was affirmed. The defendant had contended that since his act violated the laws of both federal and state jurisdictions, he might be subject "to be tried twice for the same offense" (p. 31). Justice Washington, writing for the Court, said (p. 31):

> "To this I answer, that, if the jurisdiction of the two courts be concurrent, the sentence of either court, either of conviction or acquittal, might be pleaded in bar of the prosecution before the other."

In *Bartkus,* the Court described *Houston* as follows (p. 130):

> "Thus *Houston v. Moore* can be cited only for the presence of a bar in a case in which *the second trial is for a violation of the very statute* whose violation by the same conduct has already been tried in the courts of *another government* empowered to try that question" (emphasis added).

Precisely these circumstances are presented in the case at bar. Here, the state seeks to try appellant "for a violation of the very statute" whose violation by the same act has already been prosecuted by "another government." The federal government was "empowered to try that question" by virtue of 18 U.S.C. §1952, which incorporates the state statute by reference, and permits federal trials for state crimes. It has already been

adjudicated, as above noted, that the act which "formed the basis" of the federal prosecution was "not itself a federal crime, but a violation of §§200.00 and 200.10 of the New York Penal Law." 486 F. 2d 670, 672n.

Since 1959, the *Bartkus* case has been deeply eroded in a number of ways. A year after it was decided, the Supreme Court ruled that federal prosecutors could not use evidence seized by state law enforcement officers in violation of the Fourth Amendment. *Elkins v. United States,* 364 U.S. 206 (1960). In *Elkins,* the Court recognized "the freedom of the states to develop and apply their own sanctions in their own way" and the importance of "cooperation between state and federal law enforcement officers" (p. 221). Nevertheless, technical considerations of federalism were held insufficient to defeat basic constitutional rights of individuals.

Four years later, in *Murphy v. Waterfront Commission,* 378 U.S. 52 (1964), the Court held that witnesses in a state proceeding could not be compelled to incriminate themselves under federal law, even though they had been granted immunity from state prosecutions. The Court in *Murphy* did not consider that the interest of one jurisdiction in enforcing its laws in its own way was important enough to permit infringement of the rights of witnesses in a way which would further their prosecution under the laws of another jurisdiction.

Finally, in *Benton v. Maryland,* 395 U.S. 784 (1969), the Court decided that, contrary to *Bartkus,* the Double Jeopardy Clause of the Fifth Amendment is binding upon the states through the Fourteenth Amendment. *See Burks v. United States, supra; Abney v. United States, supra; Christ v. Bretz, supra.*

The *Benton* Court also cited Justice Black's dissent in *Bartkus* (p. 795):

> "The fundamental nature of the guarantee against double jeopardy can hardly be doubted. Its origins can be traced to Greek and Roman times, and it became established in the common law of England long before this Nation's independence. *See Bartkus v. Illinois,* 359 U.S. 121, 151-155 (1959) (Black, J. dissenting)."

The Court went on to explain the great purposes of the rule against Double Jeopardy (pp. 795-96):

> "As this Court put it in *Green v. United States,* 355 U.S. 184, 187-188 (1957), '[t]he underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.'
>
> This underlying notion has from the very beginning been part of our constitutional tradition. Like the right to trial by jury, it is clearly 'fundamental to the American scheme of justice.'"

The plain teaching of *Benton* is that successive prosecutions for a single criminal act are offensive to fundamental notions of due process law, since it is part of the "American scheme of justice" that an individual shall not for a single act be repeatedly subjected to the "embarrassment, expense . . . ordeal and . . . anxiety and insecurity" of a criminal trial.

It seems clear to us that the "two sovereignties" doctrine set forth in *Bartkus* is completely inconsistent with the teaching of *Benton*. As Justice Black noted in his dissent in *Bartkus* (p. 155):

> "The Court apparently takes the position that a second trial for the same act is somehow less offensive if one of the trials is conducted by the Federal Government and the other by a State. Looked at from the standpoint of the individual who is being prosecuted, this notion is too subtle for me to grasp. If double punishment is what is feared, it hurts no less for two 'Sovereigns' to inflict it than for one. If danger to the innocent is emphasized, that danger is surely no less when the power of State and Federal Governments is brought to bear on one man in two trials, than when one of these 'Sovereigns' proceeds alone. *In each case, inescapably, a man is forced to face danger twice for the same conduct.*
>
> The Court, without denying the almost universal abhorrence of such double prosecutions, nevertheless justifies the practice here in the name of 'federalism.' This, it seems to me, is a misuse and descreation of the concept" (emphasis added).

Cf., Waller v. Florida, 397 U.S. 387, 24 L.Ed. 2d 435 and *Robinson v. Neil,* 409 U.S. 505, 35 L.Ed 2d 29.

B. Subsection (f) of Criminal Procedure Law §40.20(2), if construed to permit the present prosecution, is unconstitutional.

It is noteworthy that in at least one other jurisdiction, a state appellate court has flatly refused to follow the *Bartkus* rule in construing the state constitutional provision against double

jeopardy. *State v. Fletcher*, 22 Ohio App. 2d 83, 259 N.E. 2d 146 (Ct. App. 1970). In *Fletcher*, the court first held a state robbery prosecution barred as a matter of due process of law, since the defendants had previously been prosecuted in federal court for the same robbery. The court, after careful analysis of *Bartkus* and its precedential foundation and of *Benton*, concluded that "the rule of *Bartkus* is so enfeebled as to lack all binding force" (22 Ohio App. 2d at 91, 259 N.E. 2d at 152). The court then held that, regardless of the federal rule, successive federal-state prosecutions were barred under the double jeopardy provisions of the Ohio Constitution.

Article I, Section 10, of the Ohio Constitution provided:

> "No person shall be twice put in jeopardy for the same offense."

Of this provision, which is clearly almost identical with New York's, the court said (22 Ohio App. 2d at 99, 259 N.E. 2d at 156-157):

> "That simple, broad, unqualified statement sets out the constitutional policy of Ohio on the issue. *The evils that policy was meant to proscribe are not improved because the state and federal sovereignties combine to generate them.* It would be incongruous to allow a basic constitutional policy of a state, determined as an aspect of its sovereignty, to be frustrated by a consequence of the duality which allows that sovereignty to exist. Furthermore, it would be both inconsistent and ironic to use that federalism, which is justified in the name of protecting freedom, to obliterate a fundamental right" (emphasis added).

The court then held (22 Ohio App. 2d at 100, 259 N.E. 2d at 157):

> "There is no 'reason' or 'righteousness' and the cause of justice is not served in the second pursuit of one who has endured one jeopardy for the same act in the federal jurisdiction."

Section 40.20(2) of the Criminal Procedure Law provides that a person may not be separately prosecuted "for two offenses based upon the same act or criminal transaction . . ." It contains several exceptions, however, one of which is relied upon here by the state. That exception is found in subsection (f), which permits a prosecution for "two offenses" based on the same act or transaction where

> "(f) One of the offenses consists of a violation of a statutory provision of another jurisdiction, which offense has been prosecuted in such other jurisdiction and has there been terminated by a court order expressly founded upon insufficiency of evidence to establish some element of such offense which is not an element of the other offense, defined by the laws of this state."

It should be noted at the outset that the quoted provisions have no application at all except where "two offenses" are involved. We have urged above that the present prosecution is for the "same offense" as was the earlier federal prosecution. If the Court agrees, there is no need to consider subsection (f).

Assuming subsection (f) is considered, we respectfully urge that it does not apply in the present circumstances. Thus, even if it is held that "two offenses" are here involved, the prohibition against separate prosecution "for two offenses based upon the same act or criminal prosecution" in CPLR §40.20(2) would apply to prohibit the present prosecution.

We urge that the exception in subsection (f) is not applicable because the previous federal prosecution was

"terminated" by a jury verdict of guilty and by the entry of judgment of conviction. It was not "terminated by a court order" as required by subsection (f).

It is true, of course, that the defendants in the federal action appealed, following their conviction, to the United States Court of Appeals for the Second Circuit. It is also true that the Court of Appeals thereafter reversed the convictions and ordered the indictment dismissed on the ground that sufficient use of the facilities of interstate commerce had not been proved. We respectfully suggest that the appellate proceedings were not part of the prosecution of the federal offense charged. Had there been no appeal, the convictions would have remained standing. The appeals were taken by the defendants; they were not initiated by the Government, and did not constitute a step taken by the Government in the course of the prosecution. For these reasons, the prosecution of the federal offense should be deemed to have been terminated by the convictions, and before the appeals.

This analysis is supported by the Practice Commentary accompanying CPLR §40.20. The operation of subsection (f) is there explained by an example. The hypothetical case used to illustrate the subsection involves a dismissal by court order *at the close of the Government's evidence at trial,* rather than a reversal on appeal (11A McKinney's Consol. L. CPL §40.20, Practice Commentary, p. 108):

> "Paragraph (f) finds apt illustration in the following hypothetical case. On the basis of fraudulent misrepresentations made to various people in New York State, the defendant is prosecuted and tried in a federal court for the federal crime of using the mails to defraud. *At the conclusion of the Government's evidence, the case is dismissed by the court* on the single and explicit ground that the proof failed to establish the use of any postal facilities in the execution of

> the fraudulent enterprise. *Under these narrow circumstances,* the proposed provision permits subsequent prosecution in the New York courts for larceny by false pretenses based upon the same conduct and misrepresentations" (emphasis added).

The "narrow circumstances" referred to in the above illustration do not exist in the present case. Here, the petitioner underwent the ordeal of a complete federal trial, which proceeded to a verdict of guilty, and which was followed by the entry of judgment of conviction. We do not think subsection (f) was meant to apply to these circumstances. *See United States v. Burks, supra.*

The construction of subsection (f) which we urge would avoid the question of its validity as applied to the present defendants. As the court said in *People v. LoCicero,* 14 N.Y. 2d 374, 378 (1964), referring to one of the predecessors of Section 40.20:

> "We are obliged to construe statutes so as to avoid constitutional doubts . . .
>
> For these reasons, and in view of the fundamental character of the rule that a man shall not be twice vexed for the same cause and the deep roots it throws into the history of the criminal law, we are not inclined to narrow its application by exceptions based on an ambiguity of statutory draftsmanship."

If Section 40.20(2)(f) is held to apply in the present case, we think it is unconstitutional. Subsection (f) is in flat derogation of the deeply rooted principle that an individual should not be compelled more than once to undergo the embarrassment, expense, anxiety and insecurity of a trial for a single crime. In

People v. LoCicero, supra, this principle was described as a "fundamental" one, having "deep roots" in "the history of the criminal law" (p. 378). In *Benton v. Maryland,* 395 U.S. 784 (1969), the principle was also called "fundamental," and its origins were traced to the early common law of England and even to Greek and Roman times (p. 795). In *Benton,* the protection against double jeopardy was said to be "clearly fundamental to the American scheme of justice" (p. 796).

Even since *Benton v. Maryland,* 395 U.S. 784 (1969), the Supreme Court of the United States made it clear that the double jeopardy clause of the United States Constitution applies to the state. Now a majority of the Supreme Court makes it equally clear that the federal rule that jeopardy attaches in a jury trial on the impaneling and swearing-in of a jury is constitutionally mandated, and thus applicable to the states. The principles underlying that rule constitute an integral part of the Fifth Amendment guarantee, the majority has said in the recent case of *Christ v. Bretz,* 437 U.S. 28.

In addition the Supreme Court has held that the Double Jeopardy Clause of the United States Constitution (Fifth Amendment) holds unequivocally "that the Double Jeopardy Clause precludes a second trial once the reviewing court has found the evidence legally insufficient" (*Burks v. United States,* 437 U.S. 1). The Court emphasizes that it does not matter that the defendant in appealing sought a new trial or even stated this as his sole remedy.

In the third case decided on June 14, 1978, *Sanabria v. United States,* 437 U.S. 54, the Supreme Court also held that an alleged dismissal in some cases is actually an acquittal.

In *Sanabria, supra,* the Court held that it is improper to use so-called "discreet bases of liability" and thus divided what amounts to a single crime into two crimes. The Court said that the protection of the Double Jeopardy Clause cannot be

circumvented by dividing a single crime into "discreet bases of liability" not defined as such by the Legislature. Such a dismissal therefore bars further prosecution on any theory.

In *Abney v. United States,* 431 U.S. 651, the Supreme Court of the United States said that the prohibition of the Double Jeopardy Clause aims at preventing a person from being put to trial for the same offense twice. In quoting with approval *Price v. Georgia,* 398 U.S. 323, 326, the Supreme Court in the *Abney* case explained:

> "The Constitution of the United States in the Fifth Amendment declares, 'nor shall any person be subject [for the same offense] to be twice put in jeopardy of life or limb.' *The Prohibition is not against being twice punished, but against being twice put in jeopardy* . . . the 'twice put in jeopardy' language of the Constitution thus relates to a potential, i.e. the risk that an accused for the second time will be convicted of the 'same offense' for which he was initially tried" (citing cases omitted).

In the case at bar, of course Archer was already fully tried and went through a full appeal in the federal courts and had to suffer an additional trial in the state courts for what obviously is the "same offense" since even the prosecutor herein does not deny that the evidence is virtually identical in both cases.

We have urged above that the Fifth Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment, prohibits the present prosecution, and that any contrary indication in *Barkus v. Illinois,* 359 U.S. 121 (1959), is no longer good law. We have urged above that Article I, Section 6, of the New York Constitution also prohibits the present prosecution. If we are correct, then subsection (f) of CPL §40.20(2) contravenes these constitutional provisions, and is invalid.

We also urge that subsection (f) is violative of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, and of Article I, Section 11, of the New York Constitution.

We respectfully suggest that CPL §40.20(2)(f), if held to apply here, creates an unreasoned distinction between defendants acquitted by jury verdict on proper instructions and defendants compelled to appeal in order to vindicate their rights.

The court rejected this argument on the ground that, under the "doctrine of dual sovereignty, New York is constitutionally free to prosecute the defendant despite a prior Federal prosecution." The court pointed to CPL §40.20 holding that the statute goes further than necessary under the Constitution. The court then reasoned,

> "That New York has expanded the constitutional protection against double jeopardy, by statute, is to its credit, but the fact that some persons benefit by this expansion, while the three individuals at bar do not, is no basis for a claim that they are being denied constitutional rights."

With respect, we believe this reasoning is faulty. Even assuming that the state was not required to provide the protections contained in Section 40.20, and even assuming that Section 40.20 goes farther than necessary under the Constitution, this does not mean that the state may in a double jeopardy statute create arbitrary distinctions. *See United States ex rel. Chestnut v. Criminal Court,* 442 F. 2d 611 (2nd Cir. 1971), *cert. denied,* 404 U.S. 856 (1971). *Chestnut* involved an attack upon the grand jury selection system in New York. One argument advanced by the state was that it was not required under the Constitution to provide for any grand juries at all. Of this contention, the court said (p. 617):

> "That a state could dispense with grand juries altogether does not, of course, mean that if it adopts that mechanism the state may use it in an arbitrary and discriminatory manner."

The court also held that the defendants were clearly within subsection (f), and that there is no constitutional infirmity in the fact that the Legislature extended the protections of Section 40.20(2) to some while denying them to others. Reasoning of this sort does not go far enough. The inquiry should not end with the question whether defendants are treated as other persons in their statutorily-defined class are treated. Rather, the question is whether the statutory classifications are rationally designed to further a valid purpose.

With commendable objectivity and candor worthy of the highest standards of the judicial process, we note that Mr. Justice Sandler below likewise expressed his own misgivings with respect to the double jeopardy issue propounded at bar. The sentencing minutes show:

> "Also although I have not given the matter comparable attention and I'm aware of the Appellate Division rejection of the prior jeopardy argument and did so without dissent in this case, *my own less informed opinion is that there is a substantial prior jeopardy question which is presented on which opinions may well differ.*" (emphasis added).

We respectfully submit that a literal construction of CPL 40.20 subd. 2 and CPL 40.30 subd. 2(a), in utter disregard of the shocking prosecutorial over-reaching conclusively demonstrated in the previous prosecution at bar, would be fundamentally repugnant to both the Double Jeopardy and Due Process Clauses of the Fifth Amendment to the Constitution of the

United States and Article I, Section 6 of the New York State Constitution, and would render the statutes unconstitutional as applied to the appellant at bar.

The discrimination inherent in subsection (f) is patent. For no valid reason, it affords a defense to some while denying that defense to others who may have "committed intrinsically the same quality of offense . . ." The consitutional guarantees of equal protection of the laws outlaw such a statute.

In the case of *Klein v. Murtagh,* 44 A.D. 2d 465, 355 N.Y.S. 2d 622, a 3 to 2 opinion by the Appellate Division ruled that double jeopardy did not bar the prosecution herein. The Court of Appeals affirmed, 34 N.Y. 2d 988, 360 N.Y.S. 2d 416. That was on an Article 78 proceeding under the New York CPLR.

In the instant proceeding the issue was again raised, but the court did not change its disposition. In the case at bar, of course, we have the benefit of the actual trial and the concession by the prosecution that the evidence at both trials was identical.

II.

THE LAWLESS CONDUCT OF THE PROSECUTORS AND POLICE IN THE CASE AT BAR WAS SO OFFENSIVE TO THE ADMINISTRATION OF JUSTICE AND TO PREVAILING STANDARDS OF DECENT BEHAVIOR THAT THIS PROSECUTION SHOULD HAVE BEEN BARRED AS A MATTER OF DUE PROCESS OF LAW AND THE JUDGMENT OF CONVICTION SHOULD BE VACATED. IN *UNITED STATES V. RUSSELL*, 411 U.S. 423, AND *HAMPTON V. UNITED STATES*, 425 U.S. 484, THIS COURT EXPRESSLY RESERVED FOR FUTURE ACTION A CASE WHERE COMPELLING CIRCUMSTANCES MIGHT DICTATE THE DISMISSAL OF AN INDICTMENT BECAUSE OF POLICE MISCONDUCT, IRRESPECTIVE OF THE DEFENSE OF ENTRAPMENT. WE SUBMIT THE *ARCHER* CASE HEREIN IS SUCH A CASE.

It is obvious and not even contested that the investigation which led to the indictment herein, both federal and state law enforcement officers committed perjury before a state grand jury, committed perjury in affidavits filed in courts of records of this state, suborned the commission of such perjury, committed the crime of offering false instruments for filing with a state public official, forgery, falsified federal immigration re rds, and conspired to commit the foregoing offenses.

In addition, these officials supplied all of the ingredients for the crimes charged, both in the present indictment and in the federal indictment and actively participated in its commission. The means by which the officials manufactured the crime, controlled its execution, and enmeshed themselves in the criminal activity, are summarized in a list set forth *supra*.

That these events took place is an adjudicated fact. The Court of Appeals stating the facts in its opinion, found the following to be established (486 F. 2d at 672-73):

> "Pursuant to the scheme, Taylor gave Bario two loaded pistols, a fake Nevada driver's license, and a *false immigration card* issued by the Immigration and Naturalization Service in Washington at the request of the Director of the BNDD. The next morning Murano effected the staged arrest at a diner in Queens. Murano then took Bario to a precinct house and filed a complaint and *arrest affidavit falsely charging him* with the unauthorized possession of loaded weapons. *Bario, in turn lied about his name, his address, his marital status and his employment, produced the false Nevada driver's license and immigration card, and then certified to the correctness of the false report he had made.* When a police officer of the precinct became suspicious about the immigration card, *Bario had Murano call Taylor so that the latter could arrange for appropriate falsification of records in the Immigration and Naturalization Service in Washington.* Subsequent to arraignment in Queens County Criminal Court, at which *Bario lied about his identity*, he was admitted to bail. A special agent of the Bureau of Narcotics, posing as Bario's father, 'C. Barone,' subsequently posted Bario's bail, which had been set at $5,000. After three adjournments, a preliminary hearing was waived and the case was forwarded for presentation to the grand jury" (emphasis added).

The court also observed that Murano testified as to the details of the arrest before the grand jury, and that Bario was then called and "told his contrived tale . . ." (p. 674).

Although it did not base the reversal of the convictions upon this conduct the court vigorously criticized the investigators, saying (p. 672):

> "We do not at all share the Government's pride in its achievement of causing the bribery of a state assistant district attorney by a scheme which involved lying to New York police officers and perjury before New York judges and grand jurors; to our minds the participants' attempt to set up a federal crime for which these defendants stand convicted went beyond any proper prosecutorial role . . ."

The court also said:

> "We are not sure how we would decide this question if decision were required. Our intuition inclines us to the belief that this case would call for application of Mr. Justice Brandeis' observation in *Olmstead*. Even though that view has not been incorporated in the entrapment defense, there is certainly a limit to allowing governmental involvement in crime. It would be unthinkable, for example, to permit government agents to instigate robberies and beatings merely to gather evidence to convict other members of a gang of hoodlums. Governmental 'investigation' involving participation in activities that result in injury to the rights of its citizens is a course that courts should be extremely reluctant to sanction (pp. 676-77).

* * *

> Since we conclude reversal to be required on another ground, we leave the resolution of this difficult question for another day. We hope, however, that the lesson of this case may obviate the necessity for such a decision on our part" (p. 677).

Although the Court of Appeals for the Second Circuit found it unnecessary to reach the question, we are obliged to ask that the question be resolved by this Court, in the event the Court rejects our arguments based upon double jeopardy.

As indicated above, the Second Circuit Court of Appeals referred to the famous dissent of Justice Brandeis in *Olmstead v. United States,* 277 U. S. 438 (1928). It is worthwhile to quote from Justice Brandeis' statement, which we think should govern cases, like the present one, which involve the deliberate commission of independent felonies by law enforcement officers in the course of an investigation. Justice Brandeis said (277 U. S. at 485):

> "Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a law-breaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face."

See also, Ex Parte Milligan, 4 Wall. 2, 71 U. S. 281, 18 Law. Ed. 281 (1866), wherein the Supreme Court said (18 Law. Ed. at 295):

> "The Constitution of the United States is a law for rules and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism . . ."

The Special Prosecutor argued below, and we assume will argue here, that the Second Circuit Court of Appeals, in its opinion denying the Government's petition for rehearing, withdrew its condemnation of the criminal conduct of the investigators. We think the court did no such thing.

In addition to criticizing the investigators for having committed crimes and for having caused the bribery of a public officer, the Second Circuit also criticized (but did not rest its decision upon) the investigators' apparent abuse of federal power. The court pointed out that at the time of the investigation there was no reason to think that federal law was being violated, and that therefore the investigation may have constituted unwarranted meddling by federal officers in state affairs.

In its petition for rehearing, the Government made a number of representations as to information which had led it to believe that a federal investigation of corruption in Queens County would be entirely proper. The court, denying the petition, stated that the case for holding that there was no abuse of federal power "would certainly be stronger" if the facts were as represented by the Government. 486 F. 2d at 684.

If the court can be said to have receded at all from its original opinion, the foregoing represents the only respect in

which it did so. It did not modify in the slightest its criticism of the investigators' criminal conduct.

There is no real dispute that federal and state law enforcement officers committed the independent crimes listed above in the course of their effort to gather evidence in this case.

In *Greene v. United States*, 454 F. 2d 783 (9th Cir. 1971), a government undercover agent introduced himself as a "syndicate" criminal to defendants, who were admittedly already engaged in a bootlegging operation. The agent reached an agreement equivalent to a partnership agreement with the defendants, which provided for the manufacture, sale and distribution of bootleg alcohol under governmental financing. The agent actually provided 2,000 pounds of sugar, offered to supply bribe money to one of the defendants, and actually purchased the defendants' shipments of illegal spirits. After purchasing several shipments, and payment for them, the agent arrested the defendants. The court said (p. 787):

> "We do not believe the Government may involve itself so directly and continuously over such a long period of time in the creation and maintenance of criminal operations, and yet prosecute its collaborators. . . . But, although this is not an entrapment case, when the Government permits itself to become enmeshed in criminal activity, from beginning to end, to the extent which appears here, the same underlying objections which render entrapment repugnant to American criminal justice are operative."

There is no doubt that the Government here acted with complete indifference to the dignity of the Queens County courts and grand juries. Conduct of such arrogance, if excused, represents a danger to the federal system, and portends a disrespect for law and order in our state system as well.

The indictment should also have been dismissed, we urge, because the Government, in addition to the law-breaking described above, also permitted itself to become thoroughly enmeshed in the very criminal activity for which it is now prosecuting the defendants. Indeed, the Government manufactured this crime and controlled its execution from beginning to end. In so doing, the Government supplied the following:

1. the pistols planted on Bario;

2. the staged arrest by a policeman in on the plot;

3. the false character of "Sam Barone," including false addresses in Las Vegas;

4. the bail money;

5. the false character of "Charles Barone" (Agent Vopat) who posed as Bario's father and posted bail;

6. the false immigration card; and falsifying records of the Immigration and Naturalization Service in Washington.

7. the false driver's license;

8. Murano's perjurious arrest affidavit;

9. other false documents surrounding the arrest and posting of bail, including the false arrest report, the false information in the probation report filed by Bario, and the false bail receipt;

10. Bario's introduction to Wasserberger by DeStefano;

11. the Paris call, the Newark call and the false phone numbers in Las Vegas;

12. the false written waiver of immunity signed by Bario;

13. the perjurious testimony of Bario in the Queens Grand Jury;

14. the perjurious testimony of Murano in the Queens Grand Jury;

15. the $15,000 in bribe money itself.

Obviously, without the trappings supplied by the Government, there would have been no crime. We think it is fair to say that this crime was the Government's creation. In *Russell, supra,* the Supreme Court characterized the agent's furnishing of a chemical as "limited" participation in the criminal activity (pp. 426-7).

Here, the Government's participation can only be described as pervasive. The Government having permitted itself to "become enmeshed in criminal activity from beginning to end," it cannot be permitted to prosecute the crime its own activities produced. *Greene v. United States,* 454 F.2d 783, 787 (9th Cir. 1971).

A. The issue of entrapment is irrelevant to the question of barring this prosecution due to police misconduct.

In *Russell v. United States, supra,* and *Hampton v. United States, supra,* this Court specifically left for another day the question of whether compelling circumstances might cause it to bar a prosecution based upon police misconduct, irrespective of a defense of entrapment. We maintain that the evidence herein clearly presents such circumstances.

The Second Circuit was frankly appalled by what had occurred here, and we maintain that a perusal of the record reveals that the prosecutors and the police embarked upon a scheme to thwart the law at their pleasure in order to see if they might catch a "fish". In other words, they threw a net into the sea without knowing whether they would come up with a "fish" or not.

For many weeks the prosecutors, and federal and state agents embarked upon a preconceived plan of violating the laws of New York and of the United States in Queens County, without any knowledge as to whether or not a crime was even *in esse*. The prosecutors, no doubt, would have resorted to any means at their disposal to justify their ends.

It was not until many weeks later that the law enforcement authorities blundered upon the defendants in the case at bar and the petitioner in particular. Does that mean that all of their illegal acts, which involved no particular criminal investigation, were thereby suddenly sanctified? We think not. By the same process of logic, they could have indulged in robberies, beatings, Watergate-like maneuvers, and whatnot.

We submit that in the light of what has occurred here the only proper thing to do is to reverse and dismiss the indictment.

In the cases of *Lee v. Florida,* 392 U.S. 378, 20 L. Ed. 2d 1166 and *Rea v. United States,* 350 U.S. 214, 100 L. Ed. 233, this Court has held that deterrence of official misconduct by removing the incentive of the police officers is the most efficient and effective means of preserving constitutional guarantees. In *Lee v. Florida,* therefore, the judgment of conviction was vacated since this Court despaired of any procedure wherein there would be any effective prosecution of police lawbreakers.

The only possible interpretation that can be placed upon this case by law enforcement authorities is that the New York courts have sanctioned the use of illegal means to achieve what they considered to be a laudable end. While, unfortunately, too many comparisons have been made to the so-called "Watergate" crimes, this is not unlike the very thing that was condemned therein. We have Government officials arrogating to themselves the right to do anything they feel justified to achieve the ends of prosecuting someone.

We must bear in mind that if no criminal prosecution had resulted, presumably no one would have ever known of the frauds and the crimes that were perpetrated by the law enforcement authorities in the case at bar. It is only because of the prosecution that was brought against *Archer* and his co-defendants that this came to light altogether. How many other times this was done, we don't even know.

But to now sanctify and justify this is inconceivable and unconscionable.

We must bear in mind also that a federal law enforcement official, Bario, testified on behalf of the state prosecutors. *Rea v. United States, supra,* condemned any such procedures, irrespective of any other consideration of the case.

We believe the law has advanced beyond *Rea v. United States,* and that due process now mandates, indeed, that prosecutions such as the one at bar be condemned once and for all.

That these crimes were committed at all by government officials is shocking enough. Perhaps more shocking, however, was the excuse for this conduct which was offered by Bario at the trial. He said that he and Murano had been "*authorized*" to do what they did by Shaw and Scopetta of the United States Attorney's Office; that they were *following* "*instructions.*" This, we submit, is the very height of cynicism. Governmental agents authorized the police authorities in this case to commit crimes; to lie to courts and to a grand jury, and to make false oaths and applications. Moreover, they created a false immigration card and even falsified the records of the FBI so that Bario's fingerprint record would not come to light when he was arrested.

In summary, the indictment should have been dismissed because of the Government's commission of crimes during the events which led to this prosecution, and also because of the

degree of the Government's participation in the criminal enterprise. As the Court said in *Mapp v. Ohio,* 367 U.S. 643, 659 (1961):

> "The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the character of its own existence."

III.

THE PETITIONER HEREIN WAS DENIED A SPEEDY TRIAL. THE ARREST BY JOINT STATE AND FEDERAL ACTION IN 1972 DETERMINED THE RIGHTS TO A SPEEDY TRIAL, AND NOT THE DATE OF THE STATE INDICTMENT.

It should be noted that petitioner Archer and his co-defendants were arrested in June of 1972. The arrest was a result of joint action by federal and state authorities who, concededly, were acting in concert in the investigation leading up to that arrest.

That the Supreme Court of the United States and the United States Constitution have said, on numerous occasions, that the speedy trial provisions of the Constitution are applicable to states as well as the federal government, cannot be doubted.

In *Klopfer v. North Carolina,* 386 U. S. 213, the Supreme Court noted, *inter alia:*

> "We hold here that the *right to a speedy trial is as fundamental* as any of the rights secured by the Sixth Amendment. That right has its roots at the very foundation of our English law heritage.

> Its first articulation in modern jurisprudence appears to have been made in Magna Carta (1215). . . .
>
> The history of the right to a speedy trial and its reception in this country clearly establish that it is *one of the most basic rights preserved by our Constitution*" (emphasis ours).

Since the indictment in the federal court occurred in 1972, and the indictment in the state court did not evolve until November of 1973, it is obvious that there was an inordinate delay since both state and federal officials participated in the investigation and the arrest originally.

While we do not believe that we are discussing purely "pre-indictment" delay, it would not make any difference in the case at bar.

We must bear in mind that in the case at bar there was never any question but that Archer was charged with committing both state and federal crimes because of the fact that in order to prove his federal violations, the Government necessarily had to establish that he had violated state law.[8] Thus, the point at which the arrest took place for the crimes in the instant case before this Court must be viewed as June of 1972.

In any event, and to exacerbate matters, we submit that the defendant's right to a speedy prosecution was denied due to the fact that he was not even formally indicted until almost a year after his conviction and about six and a half months after the United States Court of Appeals threw out his case.

In *United States v. Marion,* 404 U.S. 307 (1971), the Supreme Court of the United States ruled that pre-indictment

8. Ultimately the United States Court of Appeals held that there was insufficient evidence that a federal crime was ever committed and dismissed the indictment. No pending state indictment was extant.

delay may be cognizable under the speedy trial provisions of the Constitution.

We also ask this Court to note that pre-indictment delay is also validly raised when such delay violates "fundamental conception of justice which lie at the base of our civil and political institutions . . . which define the community's sense of fair play and decency" (*United States v. Lovasco,* 431 U.S. 783, 97 S. Ct. 2044; *Rochin v. California,* 342 U.S. 165, 173; *Mooney v. Holohan,* 294 U.S. 103, 112).

There is no doubt that the Government and the State Prosecutor worked hand in glove in this matter, and we submit that Archer was lulled into a false sense of security by the fact that he was never indicted by the state authorities until after his dismissal in the United States Court of Appeals and, even then, only after more than six months had elapsed.

While we maintain that the trial is also barred under double jeopardy standards, we further submit that defendant's rights to a fair trial and the intentional tactics of the prosecution must be condemned (*United States v. Lovasco, supra; United States v. Marion, supra,* 404 U.S. at 325; *United States v. Benson,* 487 F. 2d 978 and *United States v. Dukow,* 453 F. 2d 1328, *cert. denied,* 406 U.S. 945).

Waiver of a constitutional right is never presumed. *Johnston v. Zerbst,* 304 U.S. 458 (1938).

Any claim of waiver must be predicated upon substantial evidence and not merely on inference or that motions were made on matters unrelated to any waiver (*People v. Prosser,* 309 N. Y. 353; *People v. Darrah, supra; People v. Racassi,* 32 A. D. 2d 928; *People v. Walston,* 303 N. Y. S. 2d 239, 60 Misc. 2d 531 (Nassau).

In *Dickey v. Florida,* 398 U. S. 30 (1970), Justice Brennan cogently noted:

> ". . . the equation of silence or inaction with waiver is a fiction that has been categorically rejected by this Court when other fundamental rights are at stake. Over 30 years ago in *Johnson v. Zerbst*, 304 U. S. 458, 464 . . . (1938), we defined 'waiver' as 'an intentional relinquishment of a known right or privilege.' We have made clear that courts should 'indulge every reasonable presumption against waiver,' and that they should 'not presume acquiescence in the loss of fundamental rights.' . . .
>
> A negligent failure by the government to ensure speedy trial is virtually as damaging to the interests protected by the right as a purposeful failure. . . ."

See 5 Stan. L. Rev. 95, 104, 1952, *"Justice Overdue—Speedy Trial for the Pre-Trial Defendant.*

Moreover, there is no way a suspect can compel or insist that the Government commence a prosecution; nor can a defendant determine when or if the Government may decide to prosecute. The "Sword of Damocles" may hang for the whole period of limitations!

In *Pollard v. United States*, 352 U. S. 354, 361-362 (1957), the Supreme Court not only equated "purposeful" delays with the "oppressive" ones forbidden by the Sixth Amendment, but also interpreted *United States v. Provoo*, 350 U. S. 857 (1955), *affirming Petition of Provoo*, D. Md., 17 F.R.D. 183 (1955), as condemning delay "caused by the deliberate act of the Government."

It is apparent from *Pollard v. United States, supra*, at 352 U. S. at 361, that the Supreme Court indicates that even an indictment within the limitation period may come too late to square with the Sixth Amendment. [*See Mann v. United States,*

304 F. 2d 396-397, n. 4; *Taylor v. United States,* 238 F. 2d 259 (D.C. Cir. 1956); *Nickens v. United States,* 323 F. 2d 807 (D.C. Cir. 1963); *United States v. Provoo, supra.*] *See* 18 U.S.C. §3282.

In *Godfrey v. United States,* 358 F. 2d 850, 852 (D.C. Cir. 1966), the Court of Appeals observed:

> "We note that although the total lapse of time from offense to arrest was about four months, two months of that period was not protected, in terms of reasonableness, by any purpose to advance the public interest in effective law enforcement. The District Court appears to have been of the view that, where delay to serve the purpose of the public occurs, with inevitable impact upon the interests of the accused, there is an obligation on the police to be as diligent as possible in making the arrest, to the end that the accused may know as soon as possible of the charge against him. We agree. The disadvantage to the accused inherent in the deliberate preference accorded the public interest in the one period should not be compounded by a failure to exercise appropriate diligence in the other."

In *United States v. Godfrey,* 243 F. Supp. 830, 831 (U.S.D.C., D.C. 1966), the District Court received the case on a remand from the United States Court of Appeals for the District of Columbia, for the purpose of determining,

> "the reasonableness *vel non* of the delay occurring between the dates of the alleged offense by appellant, the filing of the complaint, and the issuance of the arrest warrant, and the appellant's arrest, and the effect, if any, on the defense of the case. . ."

See also Ross v. United States, 349 F. 2d 210 (D.C. Cir. 1965). In *Ross*, the Court of Appeals (249 F. 2d at 211) proclaimed:

> ". . . We think a record of this kind *more accurately may be deemed as presenting a question akin to a Fifth Amendment due process issue*, centering around Appellant's ability to defend himself."

See United States v. Mauro, 436 U.S. 340, 98 S. Ct. 1834 (1978).

CONCLUSION

The petition for certiorari should be granted and the judgment of conviction of petitioner should be vacated.

Respectfully submitted,

IRVING ANOLIK
Attorney for Petitioner

APPENDIX

ORDER OF AFFIRMANCE OF NEW YORK COURT OF APPEALS

COURT OF APPEALS
STATE OF NEW YORK

Action No. 2

No. 203

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

vs.

NORMAN ARCHER,

Appellant.

Order affirmed for reasons stated in the Per Curiam opinion at the Appellate Division (68 A D 2d 441).

All concur.

Dated: April 24, 1980.

s/
Clerk of the Court

OPINION OF APPELLATE DIVISION
(68 App. Div. 2d 441)

June 18, 1979

SUPREME COURT : APPELLATE DIVISION

SECOND JUDICIAL DEPARTMENT

DAMIANI, J.P., SUOZZI, LAZER and RABIN, JJ.

THE PEOPLE, etc.,

Respondent,

-against-

NORMAN ARCHER,

Appellant.

APPEAL from a judgment of the Supreme Court (LEONARD H. SANDLER, J.), rendered August 5, 1977 in Queens County, upon a verdict convicting defendant of bribe receiving and receiving a reward for official misconduct.

Irving Anolik, New York, N.Y.,
for appellant

John F. Keenan, Deputy Attorney-General, New York, N.Y. (Mark M. Baker of counsel), for respondent

Aaron Nussbaum, Brooklyn, N.Y., for Macon B. Allen Black Bar Association,
amicus curiae.

P E R C U R I A M. Appellant, a former Assistant District Attorney in Queens County and head of the Indictment Bureau,

stands convicted of bribe receiving and receiving a reward for official misconduct. The jury found, beyond a reasonable doubt, that he had agreed to accept, and did accept, a sum of money from another in exchange for using his official position to have a pending criminal action "dismissed" before the Grand Jury. The primary issue on appeal is whether appellant's prosecution should have been barred by reason of alleged prosecutorial misconduct. After an exhaustive pretrial evidentiary hearing, denominated an "investigative technique hearing", the court denied appellant's motion to dismiss the indictment. We hold that appellant's prosecution was proper and that the judgment of conviction should be affirmed.

Appellant claims that this State prosecution was barred by reason of double jeopardy. Appellant was previously convicted in Federal court of offenses based upon the same criminal acts or transactions; that conviction was reversed by the United States Court of Appeals for insufficient evidence to show use of interstate facilities. This claim was considered and rejected in a CPLR Article 78 proceeding in the nature of prohibition (*Matter of Klein v. Murtagh*, 44 AD2d 465, affd 34 NY2d 988 on the opn of Mr. Justice MUNDER at the Appellate Division). He presents nothing new to cast doubt upon the continuing validity of that determination. The issue of alleged prosecutorial misconduct was also previously raised. However, it was expressly left open in the prior proceeding (see concurring opn of Mr. Justice SHAPIRO, 44 AD2d at p 473), and is now properly before us on a full factual record.

The charges against appellant arose out of an investigation into corruption in the criminal justice system in New York City, conducted by the office of the United States Attorney for the Southern District of New York, at the behest of the Knapp Commission, which was established in 1970 by then Mayor John Lindsay, and with the knowledge and approval of the New York City Police Commissioner. The key figure in this investigation was Detective Robert Leuci, a corrupt member of the former

Special Investigations Unit, which was concerned, in part, with the enforcement of narcotics laws. Leuci would only co-operate with Federal authorities, who were also interested in the integrity of narcotics law enforcement, and hence was referred to the United States Attorney's office by the Knapp Commission. Through Leuci's subsequent undercover activities, the authorities became aware of one Nicholas DiStefano, who allegedly acted as a broker in setting up various "fixes". When DiStefano accidentally discovered Leuci's undercover capacity, he was "turned" by Federal authorities.

As respects this particular facet of the investigation, which was concerned with the alleged widespread fixing of cases in Queens County, DiStefano ultimately, though reluctantly, agreed to introduce a Federal undercover agent to a named Queens County bailbondsman allegedly engaged in corrupt activities. A plan was devised by the authorities whereby the Federal agent, posing as one Salvatore Barone, would be arrested in a Queens diner for felonious possession of weapons, thus allowing him to pose as an accused felon. Use of an informant or a defendant in an actual pending criminal case, rather than an undercover agent, had earlier been considered but rejected due to the need to proceed upon the most credible and corroborated evidence possible. The arresting officer, Murano, was a New York City police officer "loaned" to the United States Attorney's office by the Police Commissioner. On the appointed day, Barone and Murano literally acted out the entire scenario inside the diner and, after the arrest, the matter was processed in the usual manner. Barone was taken to a local precinct, a felony complaint was drafted and Murano signed an arrest affidavit detailing the basis for the charge of unauthorized possession of loaded weapons. The reason for having acted out the crime and arrest in the diner was to have the complaint and related sworn statements reflect Murano's actual observations and actions. For his part, Barone related a cover story as to his identity, address, employment and immigration status, which was buttressed by false documents. Barone was subsequently

arraigned and admitted to bail, which was posted by another Federal agent posing as his father. After three adjournments, a preliminary hearing was waived and the case was forwarded for presentation to the Grand Jury. None of the police officers (except for Murano), prosecutors or Judges involved in these matters was informed of the underlying charade. The omission was purposeful since both Leuci and DiStefano had alleged that cases had been fixed in the office of the Queens District Attorney and DiStefano had maintained that a case could be fixed at any stage, thus opening the possibility that an effort might be made to do it through a Judge. The authorities did, however, inform Judge FULD, then Chief Judge of the Court of Appeals, of the planned scenario although he was not asked to approve it and, therefore, did not give his opinion on it.

Thereafter, Barone was introduced by DiStefano to Archer's codefendant, Wasserberger, a Manhattan bailbondsman. Wasserberger was approached when it was discovered that the Queens bailbondsman upon whom DiStefano had originally focused was not then in New York State. The latter was a relative of Wasserberger. Wasserberger, in turn, introduced Barone to codefendant Klein, an attorney practicing criminal law in Queens County. Klein and Barone discussed the pending criminal case and, when Barone rejected Klein's suggestion that he plead guilty to a misdemeanor and stated that it would be worthwhile to him not to have to go to court, Klein indicated that the Grand Jury would have to be convinced that no crime had occurred. The latter stated that this would cost $10,000 to $15,000 in cash, and that he would get back to Barone later on what could be done, it being necessary that he see a man in Queens first. After leaving Klein's office, Barone and Wasserberger had a discussion, during which the latter indicated that the critical person would be the District Attorney who presented the case to the Grand Jury.

The next time Barone met with Klein, Klein stated that he had contacted the Assistant District Attorney in charge of the

Grand Jury in Queens County, who could take care of Barone's problem; that this assistant would personally present the evidence to the Grand Jury; and that Barone would have to testify since the arresting officer could not be fixed, having already committed himself in the felony complaint to having seen one of the guns sticking out of Barone's belt. Klein then instructed Barone as to exactly what to say when he appeared before the Grand Jury, which story depicted Barone as an employee of a Las Vegas hotel who traveled to other cities to collect money from gamblers and carried a gun, for which he was licensed in Nevada, to safeguard such moneys. (He explained that he possessed the second gun since he was temporarily carrying it for a friend to whom he was to return it the next day.) The game plan of the Federal authorities had not contemplated that Barone would have to appear before a Grand Jury and testify under oath. However, having committed himself to the Police Commissioner and his own superiors to follow through on the allegations wherever they led and feeling an obligation to the public to determine whether Klein's statements about appellant (the Assistant District Attorney in charge of the Queens Grand Jury) were true, the United States Attorney personally approved Barone's appearance before the Grand Jury. Barone was instructed, nevertheless, not to mechanically record or transmit the proceedings before the Grand Jury, and to limit his testimony solely to the story concocted by Klein. Barone testified as instructed and Murano testified in accordance with the felony complaint and arrest affidavit. Appellant, who indeed presented the case to the Grand Jury, indicated to the jurors that Barone's Nevada gun permit had been verified and also suggested that the arrest and seizure of the guns had been unlawful. The Grand Jury voted no true bill. Sometime thereafter, searches of appellant's home and Klein's safe deposit box unearthed marked money which had been given by Barone to Klein.

In overturning appellant's prior Federal conviction for violation of section 1952 of title 18 of the United States Code,

the so-called Travel Act, for insufficient proof of the use or agreement to use interstate or foreign facilities in carrying out the above-mentioned corrupt activities, the Second Circuit declined to decide or pronounce dicta on the issues of prosecutorial misconduct and possible abuse of Federal power raised by appellant. However, it nevertheless "ventilated" its views on the subject, severely criticizing what it saw as "an arrogant disregard for the sanctity of the state judicial and police processes" displayed by the government agents, and finding the pattern of deception perhaps "less serious than some forms of governmental participation in crime that can be hypothesized [but] more offensive than the common cases where government agents induce the sale of narcotics in order to make drug arrests" *(United States v. Archer,* 486 F2d 670, 677). Despite the fact that the court had "expressly left 'resolution of this difficult question for another day' ", the government petitioned for a rehearing and explored, for the first time, the factual background of its investigation. As a result, the Second Circuit muted its criticism, noting that the fact that the Knapp Commission sought the assistance of the Department of Justice, that the New York City Police Commissioner endorsed a Federal investigation of the Queens County prosecutor's office, and that the United States Attorney disclosed the plan to a member of the State judiciary with administrative responsibility over the State court system, including Queens County, "lessens the offensiveness to the State of the conduct here at issue" (486 F2d at p 683, n 1). The record presently before us is far more complete on this issue, the factual background of this investigation having been thoroughly elicited upon the pretrial "investigative technique hearing". Based upon such record, we hold that the conduct of the law enforcement agents in this case does not offend due process and that appellant's prosecution was, therefore, proper.

The United States Supreme Court has thus far declined to bar a prosecution arising out of police misconduct unless the

defense of entrapment has also been made out, although it has not ruled out such action in the future under sufficiently compelling circumstances (see *United States v. Russell,* 411 US 423; *Hampton v. United States,* 425 US 484). Nevertheless, our own Court of Appeals has recently imposed higher standards on police conduct under our State Constitution and has articulated some of the more telling facts in a State due process analysis of permissible police conduct. Thus, in *People v. Isaacson,* (44 NY2d 511, 521-522), the court held:

> "Illustrative of factors to be considered are: (1) whether the police manufactured a crime which otherwise would not likely have occurred, or merely involved themselves in an ongoing criminal activity (compare *Greene v. United States,* 454 Fd 783, with *United States v. Russell,* 411 US 423, *supra*); (2) whether the police themselves engaged in criminal or improper conduct repugnant to a sense of justice (see *United States v. Archer,* 486 F2d 670, *supra;* cf. *Rochin v. California,* 342 US 165, *supra);* (3) whether the defendant's reluctance to commit the crime is overcome by appeals to humanitarian instincts such as sympathy or past friendship, by temptation of exorbitant gain, or by persistent solicitation in the face of unwillingness (see Schecter, Police Procedure and the Accusatorial Principle, 3 Crim L Bull 521, 527); and (4) whether the record reveals simply a desire to obtain a conviction with no reading that the police motive is to prevent further crime or protect the populace. No one of these submitted factors is in itself determinative but each should be viewed in combination with all pertinent aspects and in the context of proper law enforcement objective — the prevention of crime

> and the apprehension of violators, rather than the encouragement of and participation in sheer lawlessness. As a bare minimum, there should be a purposeful eschewal of illegality or egregious foul play. A prosecution conceived in or nurtured by such conduct, as exemplified in these guidelines, so as to cast aside and mock 'that fundamental fairness essential to the very concept of justice' should be forbidden under traditional due process principles."

Applying these factors to the case at bar, we find that while the government created the predicate for appellant's crime by contriving a criminal case which could then be "fixed", it did not manufacture a crime which otherwise would not likely have occurred. At the time contact was made with Wasserberger, the government did not know of Klein and appellant. There never was any contact between appellant and Barone, the government agent, until all the details had been worked out by Klein and, pursuant to that plan, Barone appeared before the Grand Jury and testified to their concocted story, as instructed. Thus, appellant's participation in this corrupt scheme was not the product of active encouragement or instigation by the government. Rather, it was Klein who brought appellant into the scheme after Barone suggested that it was worth it to him were the case not to proceed; and it was these conspirators who readily seized upon the opportunity presented and determined just how dismissal was to be accomplished. Appellant has never claimed entrapment or lack of predisposition and there is no evidence whatsoever that his participation in this scheme was the least bit reluctant. On the contrary, the evidence strongly suggests that appellant and Klein were engaged in ongoing criminal activity long prior to the appearance on the scene of the government agent. Furthermore, the record conclusively establishes that the government's motivation in this affair was to weed out existing corruption and restore the integrity of the criminal justice system in Queens County.

Opinion of Appellate Division (68 App. Div. 2d 441)

The last factor remaining for consideration under the *Isaacson* analysis is whether the government itself engaged in criminal or improper conduct repugnant to a sense of justice. We hold that it did not. It is appellant's contention that both Federal and State law enforcement officers committed perjury before a State Grand Jury and in affidavits filed in courts of record, suborned the commission of such perjury, committed the crime of offering false instruments for filing with a State public official, falsified Federal immigration records, and conspired to commit the foregoing offenses. Taken literally, it would appear that the conduct of law enforcement officials in this case could well fall, prima facie, within the prohibitions of our Penal Law. On the other hand, a defense of justification in that these "offenses" were "performed by a public servant in the reasonable exercise of his official powers, duties or functions" (see Penal Law, §35.05, subd 1) would also appear to be available. Thus, whether the subject conduct constituted a crime is not the limit of our inquiry. The real question is whether such conduct was consistent with a sense of justice and respect for appellant's fundamental rights.

It should be noted that before the government sanctioned a plan of action which would involve deception of various officials in the criminal justice system, it first carefully considered other less offensive alternatives and, after discarding them, at least tried to limit the deception to the minimum extent necessary. Furthermore, prior knowledge of the plan was given to then Chief Judge of the New York State Court of Appeals, who had administrative responsibility for the criminal justice system in Queens County. The government's original scenario did not include or foresee the deception of a regular Grand Jury, unlike the situation in *Matter of Nigrone v. Murtagh* (46 AD2d 343, affd in part and app dsmd in part on other grounds 36 NY2d 421). There, the prosecution set up a simulated robbery arrest, processed the matter through the lower court and secured an indictment for robbery from a regular Grand Jury, without ever

informing the grand jurors or the Assistant District Attorney who presented the case that the entire matter was a hoax. Thereafter, the prosecutor set up a situation whereby the ostensible defendant, really an undercover police officer, appearing with his retained counsel, a target of the investigation, deceived the court with respect to a bail forfeiture. Counsel later withdrew from the case on the stated ground that his client was insisting he "fix" the case, after which counsel, and two others, were called to testify before a special Grand Jury and were eventually indicted for perjury. Although this court employed some broad language in condemning the conduct of the prosecutor in *Nigrone* (the perjury indictment was, however, upheld), our primary concern was clearly with his intolerable misuse of the regular Grand Jury. That deception of the Grand Jury, which occurred long after the investigation scrutinized at bar, constituted a mere predicate step in the prosecution's scenario and was an integral part of the investigative technique employed. At bar, by way of contrast, the Grand Jury deception was planned and engineered by the criminal conspirators, not the government, and constituted the very means by which the conspirators chose to carry out their crime. Indeed, it was the same activity for which appellant was prosecuted. Under these circumstances, too, disclosure of the contrived character of the Barone criminal case to either the grand jurors or the prosecutor was impossible, as a practical matter.

We would again caution law enforcement officials, when dealing with corruption within the criminal justice system, that they may no more engage in flagrant misuse of such system than the individuals they seek to prosecute. However, we are persuaded that the conduct of law enforcement officials in this case was not improper. Although for the future such deception might more wisely be circumscribed by the development of judicial guidelines, we hold, to use the words of the Extraordinary Special and Trial Term, that "the carefully selected use of the contrived crime under appropriately

compelling circumstances", which is this case, is not repugnant to a sense of justice. We also hold that viewing all of the factors pertinent to a proper due process analysis of police conduct in combination, due process does not mandate dismissal of appellant's indictment.

We have examined appellant's remaining claims for reversal of his conviction and find them to be without merit. We would add that it is improper for the *amicus curiae* herein to raise issues and cite alleged errors which were never raised or cited by appellant either in the trial court or on appeal.

DAMIANI, J.P., SUOZZI, LAZER and RABIN, JJ., concur.

OPINION OF UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT (486 F.2d 670)

UNITED STATES of America, Appellee,

v.

Norman ARCHER et al., Defendants-Appellants.

Nos. 1039, 1040, 1041, Dockets 73-1527, 73-1528, 73-1711.

United States Court of Appeals, Second Circuit.

Argued June 22, 1973.

Decided July 12, 1973.

Rehearing Denied Sept. 26, 1973.

Defendants were convicted in the United States District Court for the Southern District of New York, Charles H. Tenney, J., of using telephone facilities in interstate and foreign commerce to commit bribery, and of conspiring to commit the same offense, and they appealed. The Court of Appeals, Henry J. Friendly, Circuit Judge, held that evidence was insufficient to transform telephone calls made by defendants, pursuant to a federally provoked incident on local corruption, into a crime against the United States.

Convictions reversed with instructions to dismiss indictment.

Irving Anolik, New York City, for defendant-appellant Norman Archer.

Milton S. Gould, New York City (Shea, Gould, Climenko & Kramer, New York City, of counsel), for defendant-appellant Frank R. Klein.

John L. Pollok, New York City (Edward Gasthalter, and Lenefsky, Gallina, Mass, Berne & Hoffman, New York City, of counsel), for defendant-appellant Leon Wasserberger.

Richard Ben-Veniste, Asst. U.S. Atty., New York City (Paul J. Curran, U.S. Atty. for the S.D. of New York, Rudolph W. Giuliani, John W. Nields, Jr., John D. Gordan III, Kenneth R. Feinberg and Richard J. Davis, Asst. U.S. Attys., of counsel), for appellee.

Maurice H. Nadjari, Deputy Atty. Gen., Peter J. O'Connor, Sp. Asst. Atty. Gen., for the Office of Special Prosecutor, State of New York, amicus curiae.

Frank S. Hogan, Dist. Atty., New York County, Alfred J. Scotti, Chief Asst. Dist. Atty., and Michael R. Juviler, Asst. Dist. Atty., amicus curiae.

Michael Armstrong, Dist. Atty., Queens County, amicus curiae.

Before FRIENDLY, FEINBERG and MANSFIELD, Circuit Judges.

HENRY J. FRIENDLY, Circuit Judge:

This case arises from what the Government characterizes as "part of an intensive combined Federal and local investigation into the nature and extent of corruption within the New York criminal justice system." Its brief tells us that the investigation "was premised on the belief that attempts to combat corruption in the criminal justice system"—to wit, New York City's—"through uncovering incidents of past wrongdoing had failed." It was essential, the Government insists, to arrange "undercover penetration into ongoing corrupting activities" by

having "a federal agent assume the role of a potential consumer of corruption." We do not at all share the Government's pride in its achievement of causing the bribery of a state assistant district attorney by a scheme which involved lying to New York police officers and perjury before New York judges and grand jurors; to our minds the participants' attempt to set up a federal crime for which these defendants stand convicted went beyond any proper prosecutorial role and needlessly injected the Federal Government into a matter of state concern.[1] However, we base our reversal of these convictions and our instruction to dismiss the indictment on the more limited ground that the Government did not provide sufficient proof of use or agreement to use interstate or foreign telephone facilities to satisfy the requirements of the so-called "Travel Act," 18 U.S.C. §1952.

I.

The plan for setting up a crime was conceived at a February 1972 meeting attended by Thomas Taylor, the Regional Director of the Bureau of Narcotics and Dangerous Drugs (BNDD); several special agents of the Bureau, including one Sante A. Bario; Vincent Murano, a New York City police officer; and two Assistant United States Attorneys for the Southern District of New York. According to the plan, Bario would assume the name Salvatore Barone and pose as a resident alien and member of the Las Vegas underworld. Murano would then "arrest" Bario in Queens County on the phony charge of the unauthorized

1. A special prosecutor has since been named by the Governor of New York to investigate precisely the kind of corruption in offices of New York City district attorneys at which the federal prosecutor's activities here were aimed.

The act of bribery that formed the basis for the federal prosecution here was not itself a federal crime, but a violation of §§200.00 and 200.10 of the New York Penal Law McKinney's Consol. Laws, c. 40. That violation became a federal offense, according to the Government's theory, when interstate facilities were used to aid in committing it.

possession of two loaded pistols, a felony under §265.05 of the New York Penal Law. After his arraignment, Bario would make it known that he would be willing to pay a considerable sum to avoid trial or conviction on the charge. With Bario as bait, the planners hoped that some evidence of corruption would surface and that some use of interstate facilities would occur or could be arranged so that the incident of corruption would be transformed into a violation of the Travel Act.

Pursuant to the scheme, Taylor gave Bario two loaded pistols, a fake Nevada driver's license, and a false immigration card issued by the Immigration and Naturalization Service in Washington at the request of the Director of the BNDD. The next morning Murano effected the staged arrest at a diner in Queens. Murano then took Bario to a precinct house and filed a complaint and arrest affidavit falsely charging him with the unauthorized possession of loaded weapons.[2] Bario, in turn, lied about his name, his address, his marital status and his employment, produced the false Nevada driver's license and immigration card, and then certified to the correctness of the false report he had made. When a police officer at the precinct became suspicious about the immigration card, Bario had Murano call Taylor so that the latter could arrange for appropriate falsification of records in the Immigration and Naturalization Service in Washington. Subsequent to arraignment in Queens County Criminal Court, at which Bario lied about his identity, he was admitted to bail. A special agent of the Bureau of Narcotics, posing as Bario's father, "C. Barone," subsequently posted Bario's bail, which had been set at $5,000. After three adjournments, a preliminary hearing was waived and the case was forwarded for presentation to the grand jury.

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2. Murano testified that he had done all this on the instructions of the two Assistant United States Attorneys.

Nicholas DiStefano, a figure not unknown to this court, see United States v. DiStefano, 464 F.2d 845 (2 Cir. 1972), who, the Government tells us, "was cooperating in a limited manner with the United States Attorney's Office," was then brought upon the stage. On April 19, DiStefano introduced Bario to defendant Wasserberger, an associate of a Manhattan bail bondsman. Wasserberger told Bario he was aware of the latter's arrest and had already spoken to a Queens attorney with "big connections," to wit, defendant Klein. Bario responded that he was "not interested just in any lawyer," but was "under the opinion that something more effective could be done." Wasserberger repeated that Klein had "strong connections" and that he could "do something" for Bario. When Wasserberger suggested that they drive to Klein's office, Bario agreed. While enroute, Wasserberger told Bario "it was too bad the case went before the grand jury, because it could have been taken care of before the lower court." Bario then said he "could not afford to be seen in a courtroom" and asked "what could be done." Wasserberger answered that they must try to "get the case kicked out before it went any further."

On meeting Klein, Bario first declined a proposal that he plead to a misdemeanor charge. Klein then echoed Wasserberger's advice that "the only thing then left to do was to have the grand jury return no indictment." To arrange that, Klein added, would cost a lost of money—probably between $10,000 and $15,000 in cash. He sought a telephone number where he could reach Bario in Las Vegas; Bario responded, truthfully for once, that he would be out of the country and that he would call Klein instead. Klein promised to have "an answer" by April 25 at the latest. Bario then paid Klein a $500 "retainer" and departed with Wasserberger. On the ride back to Manhattan, Wasserberger explained that part of the total payment would have to go to the assistant district attorney who would be in charge of the presentation to the grand jury. When Wasserberger asked how he could reach Bario in Las Vegas if

that became necessary, Bario responded that he could be contacted by paging at the Sahara Hotel or, if that did not succeed, by leaving a message with the hotel telephone operator. In fact, Bario had no contacts whatsoever with the hotel.

On April 25 Bario, who had gone to France on a genuine narcotics investigation, called Klein from Paris. Klein arranged a meeting at his office for April 27, at which time he said he would have some news. Bario then flew back. Early on the morning of April 27 Bario and Murano, on instructions from an Assistant United States Attorney, went to a hotel in Newark, N.J., admittedly for the sole purpose of having Klein talk in an interstate telephone call. The calls began before 8 A.M., and were repeated every ten to fifteen minutes. At around 9 A.M., someone answered, and Bario asked that Klein return the call to him in Newark. Later that morning, Klein did.

Bario met Wasserberger and Klein at the latter's office later in the day. Klein reported that he had been in touch with the Queens assistant district attorney in charge of the grand jury, and that the latter, who turned out to be defendant Archer, had suggested that Klein created a fictitious story to afford some justification for Bario's possession of the guns. The three men concocted a story whereby Bario would testify he was carrying cash as a "junket coordinator" for a Las Vegas hotel and was obliged to carry a pistol, for which he had a Nevada license; Klein and Wasserberger both assured Bario that no one would check the details. The story invented to justify possession of the second pistol was considerably more preposterous; Bario would explain that he was carrying the gun for a friend overnight so that the friend could avoid upsetting a young woman with whom he had a date. Klein then informed Bario that the grand jury hearing was scheduled for May 8. The total price was fixed at $15,000 in cash, including the $500 that Bario had already paid. Klein insisted that Bario deliver the $14,500 balance to him on May 5. Bario's plan to lie to the grand jury was disclosed to the Assistant United States Attorneys and sanctioned by them.

On May 5, Bario made an intrastate call to Wasserberger to postpone delivery of the $14,500. Wasserberger said he had been trying unsuccessfully to call Bario at the Sahara Hotel in Las Vegas in order to tell him that the grand jury appearance had been postponed from May 8 to May 9; it was agreed that the cash should be delivered on May 8. On that date, Bario delivered the money to Klein in marked bills, and Klein placed it in his safe deposit box.

After a dress rehearsal in Klein's office shortly after noon on May 9, Bario went to the grand jury room with Klein and Wasserberger. While the three were sitting in the waiting room, Klein pointed out Archer and said, "That's our man." Before the grand jury, Murano was first called to testify as to the details of the arrest. Bario then told his contrived tale, except that he did not mention the Nevada permit. Archer elicited that fabrication and led Bario as the latter denied awareness that the Nevada permit did not entitle him to carry a gun in New York. The plan threatened to miscarry when a grand juror asked whether the existence of the Nevada pistol license had been verified, but Archer stepped into the breach by falsely asserting that it had. Before the grand jury retired, Archer made a statement minimizing Bario's offense and adding, untruthfully, that Murano had expressed some doubt whether his observation of the guns had been adequate to justify Bario's arrest. The grand jury returned no true bill. Following the successful culmination of the scheme, Government agents observed an encounter between Klein and Archer. About a month later they terminated their investigation by conducting searches, pursuant to warrants, of Archer's home and Klein's safe deposit box. On the view we take of the case, it is unnecessary to treat these events in detail.

II.

Mere recital of the facts in this case inevitably calls to mind the celebrated passage in the alternative ground of Mr. Justice

Brandeis' dissent in Olmstead v. United States, 277 U.S. 438, 485, 48 S. Ct. 564, 575, 72 L.Ed. 944 (1928):

> Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face.

Justice Brandeis' statement is eloquent but his view, taken in full breadth, has never commanded the support of a majority of the Supreme Court. In *Olmstead* itself this portion of his dissent was joined only by Mr. Justice Holmes and Mr. Justice Stone.[3] While the first ground of the dissent, namely, that warrantless wiretapping violates the Fourth Amendment, 277 U.S. at 471-479, 48 S.Ct. 564, has since been vindicated, Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), there has been no corresponding adoption of the second,

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3. Mr. Justice Butler, who joined in the portion of the dissent relating to the Fourth Amendment, thought the "dirty business" issue was not properly before the Court. 277 U.S. at 486, 48 S.Ct. 564.

based on the criminality of the acts of the Government agents under the laws of the State of Washington, 277 U.S. at 479-480, 48 S.Ct. 564. From Casey v. United States, 276 U.S. 413, 48 S.Ct. 373, 72 L.Ed. 632 (1928), decided two months before *Olmstead,* to Russell v. United States, 411 U.S. 423, 93 S.Ct. 1637, 36 L.Ed.2d 366 (1973), decided this year, the Court has steadfastly refused to rule that governmental participation in a crime necessarily vitiates the conviction of private individuals who took part in committing the offense. In *Casey,* the Court affirmed (per Mr. Justice Holmes) a conviction in a case where federal narcotics officers induced prisoners to request their attorney to supply them with narcotics for which the prisoners paid with sums advanced by the Government. Only Justices Brandeis and Butler dissented on the grounds of the Government's conduct. Yet *Casey,* like other entrapment cases where the Government has prevailed, is distinguishable from this case in several respects. In *Casey* the jailer suspected that a federal crime was being committed by a specific individual; here, as far as appears, the instigators of the scheme had only a generalized belief that something was rotten in the Queens County District Attorney's office. Furthermore, in *Casey,* as in the more common cases where federal undercover agents have induced the sale of narcotics, the criminal activity in which the Government agents participated was the very activity for which the defendant was prosecuted. Finally, in cases of that sort, the Government agents have actually not committed a crime at all since they have had no criminal intent.[4] In this case, by contrast, the Government "authorized" Bario and Murano to engage in crimes under New York law,[5] several of them prior to the

4. There are, of course, cases where agents intend to keep some or all of the purchased narcotics and make a later sale, but the government obviously is not a party to that intent.

5. The Government argues that no one was hurt by the state crimes committed by Bario and Murano since in fact there had been no actual violation of New York's gun law, Penal Law § 265.05. The Government would

(Cont'd)

discovery of any criminal activity on the part of the defendants and quite independent of the crimes the defendants committed.

The Government relies heavily on the recent decision in Russell v. United States, *supra,* where the Court reaffirmed the "subjective" view of the entrapment defense taken by the majority in Sorrells v. United States, 287 U.S. 435, 53 S.Ct. 210, 77 L.Ed. 413 (1932), and repeated in Sherman v. United States, 356 U.S. 369, 78 S.Ct. 819, 2 L.Ed.2d 848 (1958). By a 5-4 vote, the Court rejected the contention that the entrapment defense should focus primarily on the propriety of police behavior in inducing the defendant to commit a crime. The Ninth Circuit in *Russell* had reversed the defendant's conviction for illegally manufacturing methamphetamine because the Government agent had supplied Russell with the essential chemical ingredient required for producing the drug. This behavior, the court wrote, constituted "an intolerable degree of governmental participation in the criminal enterprise." 459 F.2d at 673. In reversing, Mr. Justice Rehnquist wrote for the Court that at least in drug-related offenses, "infiltration of drug rings and a limited participation in their unlawful present practices" is permissible, as it is "the only practicable means of detection. 411 U.S. at 431, 93 S.Ct. at 1643. Moreover, the Court pointed out that in *Russell* the Government agent had violated no independent constitutional right of the defendant and, by merely providing the ingredients for the illegal process, he did not violate any federal statute or commit any crime. Finally, in holding that entrapment takes place only when the government's deception "actually implants the criminal design in the mind of the defendant," the Court admonished that the defense "was not intended to give the federal judiciary a 'chancellor's foot' veto over law enforcement practice of which it did not approve." 411 U.S. at 434, 93 S.Ct. at 1644.

(Cont'd)
distinguish this case from one where federal agents were instructed to deny a state crime that had in fact been committed. In its view the waste of the time of New York police officers, judges and grand jurors in considering a fictitious crime was more than counterbalanced by the results achieved.

The defendants have attempted to distinguish *Russell* on the ground that there the Government's participation in the criminal enterprise was limited, while here it was pervasive. They point particularly to Mr. Justice Rehnquist's *caveat*, 411 U.S. at 431, 93 S.Ct. at 1643, that the Court might "some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction, cf. Rochin v. California, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952) . . ." The Government responds that the citation of *Rochin*, where the Court, under the due process clause, set aside a state conviction because of police conduct involving "[i]llegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents," 342 U.S. at 172, 72 S.Ct. at 209, shows that Mr. Justice Rehnquist was thinking of conduct *directed at the defendants* which shocked the conscience of the Court even though it did not come within any "specific" of the Bill of Rights. No such "direct and immediate infringement of the rights of a defendant" occurred here, the Government insists.

[1, 2] We are not sure how we would decide this question if decision were required. Our intuition inclines us to the belief that this case would call for application of Mr. Justice Brandeis' observation in *Olmstead*. Even though that view has not been incorporated in the entrapment defense, there is certainly a limit to allowing governmental involvement in crime.[6] It would be

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6. While some passages in *Russell* strongly suggest that courts should abstain from overturning convictions because of law enforcement tactics that do not appeal to them, see 411 U.S. at 432, 93 S.Ct. 1637, the Court made it clear that the entrapment defense would not be the only means for a defendant to contest the propriety of police practices utilized to apprehend him. Besides the reference to *Rochin*, the Court noted that law enforcement practices would remain subject to "constitutional and statutory limitations and to judicially

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unthinkable, for example, to permit government agents to instigate robberies and beatings merely to gather evidence to convict other members of a gang of hoodlums. Governmental "investigation" involving participation in activities that result in injury to the rights of its citizens is a course that courts should be extremely reluctant to sanction. Prosecutors and their agents naturally tend to assign great weight to the societal interest in apprehending and convicting criminals; the danger is that they will assign too little to the rights of citizens to be free from government-induced criminality.

[3] In this case the Government argues, its conduct did not infringe the rights either of the defendants or of any third parties; see fn. 5. Yet the Government agents displayed an arrogant disregard for the sanctity of the state judicial and police processes. The investigators apparently permitted their deserved contempt for corrupt practitioners in the Queens criminal justice system to spill over into disdain for all the participants in the system—including the police, the courts, and the members of the grand jury, all of whom were subjected to the Government's fabrications. While this pattern of deception may be less serious than some forms of governmental participation in crime that can be hypothesized, it is substantially more offensive than the common cases where government agents induce the sale of narcotics in order to make drug arrests.

Since we conclude reversal to be required on another ground, we leave the resolution of this difficult question for

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fashioned rules to enforce those limitations." *Id.* It is doubtful, however, that the constitutional principles in this area will be any less "unmanageably subjective" than the entrapment decisions Mr. Justice Rehnquist criticized. In his concurring opinion in Williamson v. United States, 311 F.2d 441, 445 (5 Cir. 1962), the celebrated "contingent-fee informer" case, Judge Brown gave vent to the frustration of trying to draw lines between permissible and impermissible forms of undercover activity: "What we hold is that, recognized as is the role of informer in the enforcement of criminal laws, there comes a time when enough is more than enough — it is just too much."

another day. We hope, however, that the lesson of this case may obviate the necessity for such a decision on our part.

III.

We take a similar view with respect to the question whether this prosecution should be dismissed because the initiation of the investigation was founded on a grossly inflated conception of the role of the federal criminal law. There is no evidence that, at the time of the February 1972 meeting, the federal law enforcement officers had any information that the supposed corruption of the Queens County District Attorney's office involved violations of the Travel Act, 18 U.S.C. §1952;[7] the hope was rather that if the playing of the Bario-Murano scenario would induce corrupt activity, some interstate or foreign element might occur or, if not, might be injected.[8] Today there is widespread concern whether the federal criminal law has not outrun reasonable bounds; "Federal auxiliary criminal jurisdiction" has spread to the point where "[t]here is practically no offense within the purview of local law that does not become a Federal crime if

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7. Subsequent to oral argument, the Government informed us by letter that the United States Attorney's office had "advised a high New York State Court official of the investigation, the need therefor, and the techniques to be employed in the undercover arrest of a federal agent," although conceding that not "all facets of the investigation as they later developed were communicated to the court." But it is not for an unnamed state court official to determine the proper scope of federal law enforcement.

8. Counsel for the Government suggested at argument and repeated in the letter mentioned in fn. 7 that corruption in any local prosecutor's office provides a safe harbor for organized crime, which almost inevitably crosses state lines. While this may be so, the proper course for federal officers would seem to be to aim the investigation at the organized crime. In this case the Government alleges only that it was aware of "the existence of corruption in high places," and not who was engaged in it or whether it involved any interstate activity whatsoever.

some distinctive Federal involvement happens to be present." See N. Abrams, Consultant's Report on Jurisdiction, 1 Working Papers of the National Commission on Reform of Federal Criminal Laws, 33, 36 (1970). Although §207 of the Commission's Proposed Code, entitled "Discretionary Restraints on Exercise of Concurrent Jurisdiction," includes among the cases where "a substantial federal interest exists," the instance in which "state or local law enforcement has been so corrupted as to undermine its effectiveness substantially," it is not clear that this comprehends a case where federal investigators have no reason to suspect any violation of federal law. Even if the proposed code section was intended to cover such cases, we are not sure we would agree that the federal interest should extend that far.

[4] While responsibility for keeping federal criminal investigations and prosecutions within the bounds appropriate on the assumptions inherent in a federal system should rest, in the first instance, with United States Attorneys under the active guidance of the Attorney General, see Friendly, Federal Jurisdiction: A General View 55-61 (1973), we are not prepared to say that, absent Congressional limitation, a federal court may never dismiss a prosecution as an abuse of federal power, see Hart & Wechsler, The Federal Courts and the Federal System 1287 (2d ed. 1973). However, we find it unnecessary to decide whether we have such a power or should exercise it here, since we hold these convictions must be reversed on another, although not unrelated, ground.

IV.

In determining whether the three interstate or foreign telephone calls in this case sufficed to trigger application of the Travel Act, it is well to have the language of the statute before

us; we have reproduced the pertinent portions in the margin.[9]

One is immediately struck by the excess of the spread of the language of the statute over the title. The title refers only to interstate and foreign travel or transportation; yet the text also includes the use of any facility in interstate or foreign commerce. The title refers only to acts "in aid of racketeering enterprises"; yet the definition of "unlawful activity" in the text displays no such limitation. The legislative history affords little indication of Congressional awareness of the enormous reach the statute could have if literally interpreted. Indeed, there is even some evidence that Congressional inadvertence contributed to the

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9. *Interstate And Foreign Travel Or Transportation In Aid Of Racketeering Enterprises.*

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or controlled substances (as defined in section 102(6) of the Controlled Substances Act) or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

expansion in the scope of the Act as it made its way through the House and Senate committees, see fn. 10 *infra*.

The source of the statute, which was adopted with remarkable speed and little discussion, was a bill forwarded to Congress by Attorney General Kennedy on April 6, 1961. His letter of transmittal urged that:

> Because many rackets are conducted by highly organized syndicates whose influence extends over State and National borders, the Federal Government should come to the aid of local law enforcement authorities in an effort to stem such activity.

87th Cong. 1st Sess., S.Rep.No..644 at p. 4; H.R.Rep.No.966, reprinted in 2 U.S. Code Cong. & Adm.News pp. 2664, 2666 (1961). He told the Senate Judiciary Committee that the Act was necessary to aid local law enforcement officials in many instances where "the 'top men' of a given criminal operation resided in one State but conducted their illegal activities in another." Hearings on S. 1653-1658, S. 1665 before the Senate Judiciary Committee on the Attorney General's Program to Crush Organized Crime and Racketeering, 87th Cong. 1st Sess. (1961) at 15-17 quoted in United States v. Nardello, 393 U.S. 286, 290-291, 89 S.Ct. 534, 21 L.Ed.2d 487 (1969). The target of the Act, he said, "clearly is organized crime." The statute would not curtail "the sporadic, casual involvement in these offenses, but rather a continuous course of conduct sufficient for it to be termed a business enterprise." S.Rep.No.644, at 3. See Rewis v. United States, 401 U.S. 808, 811-812 n. 6, 91 S.Ct. 1056, 1059, 28 L.Ed.2d 493 (1971). In his testimony before the House committee, the Attorney General "cited numerous instances of the use of the facilities of interstate commerce by racketeers and hoodlums to promote the illegal enterprises, to distribute the proceeds among the syndicate members of illegal gambling,

liquor, narcotics, and prostitution businesses and the use of the facilities for the commission of crimes of violence in furtherance of the unlawful activities." H.R. Rep. No.966, 2 U.S.Code Cong. & Adm. News, *supra* at p. 2665. Yet the bill he submitted, if read literally, would cover a $10 payment to fix a traffic ticket if only the person desiring the fix walked across a state line to pay off the policeman.

The Senate did nothing to narrow the language to the stated purpose. 107 Cong.Rec. 13942-44 (1961). The House tried to do so by amending what is now §1952(b)(2) to read "extortion or bribery *in connection with such offenses"* (emphasis supplied), to wit, gambling, liquor, narcotics or prostitution offenses "in violation of the laws of the State in which they are committed or of the United States." H.R.Rep. No.966, 2 U.S.Code Cong. & Adm.News, *supra* at p. 2667. But the Senate, responsive to an objection from the Department of Justice that the House amendment would eliminate "offenses such as 'shakedown rackets', 'shylocking' and labor extortion which were traditional sources of income for organized crime," United States v. Nardello, *supra,* 393 U.S. at 292, 89 S.Ct. at 537, refused to agree to the change; the House Managers yielded, 107 Cong.Rec. 18814-15 (1961), and the bill was adopted in substantially its present form.[10]

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10. Possibly through inadvertence, the House substantially increased the scope of the Travel Act during its rush toward passage. The original bill, as submitted by the Attorney General, covered only interstate and foreign *travel.* At the urging of Senator Keating, the Senate Judiciary Committee added a section covering *transportation* in interstate and foreign commerce. The Senate Committee also revised the title to its current form to reflect the change, S.Rep. No. 644, at 1, 4, and the Senate passed the bill in that form. In attempting to tidy up the language of the bill, however, the House Committee expanded its scope considerably. Purporting merely to combine the two sections of the Senate bill into a single section, the House Committee substituted the present language extending the coverage of the Act to "whoever *travels* in interstate commerce or *uses any facility* in interstate commerce,

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It would go beyond the proper exercise of judicial power for courts to confine the Travel Act to its title, see Fraser v. United States, 145 F.2d 139, 142 (6 Cir. 1944), cert. denied, 324 U.S. 849, 65 S.Ct. 684, 89 L.Ed. 1409 (1943), or even to the precise purpose stated to Congress by the Attorney General. Nonetheless, the question remains whether the defendants here have used a facility in interstate or foreign commerce, for the purposes listed in §1952(a)(3), in a sufficiently meaningful way to subject themselves to liability under the statute. In deciding that limited issue, we are free, indeed bound, to look to the legislative history, to consider the demands of federalism, and to heed the venerable rule, reaffirmed by the Supreme Court with respect to this very statute, that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." Rewis v. United States, *supra,* 401 U.S. at 812, 91 S.Ct. at 1059.

While the precise holding of *Rewis* was that the proprietors of a Florida gambling establishment did not violate the Travel Act merely because some of their customers came from Georgia,

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including the mail . . . ." The Committee demonstrated its unawareness of the significance of the alteration by reporting that the amendment made "no substantive change in the provisions of the bill" and by retaining the Senate's more restrictive title. H.R.Rep. No. 966, 2 U.S. Code Cong. & Adm. News, *supra* at p. 2664. The conference committee failed to catch the change; it agreed to the House's amendment because of the cosmetic value of adding a single streamlined section to title 18 rather than two cumbersome, largely repetitive ones. H.R. Rep. No. 1161, 107 Cong. Rec. 18814-15 (1961). In construing §1952, the courts have perforce read the statutory language to mean just what it seems to mean, and have uniformly applied the Travel Act to interstate telephone calls as well as interstate travel and transportation. See, *e.g.*, United States v. Armiento, 445 F.2d 869 (2 Cir.), cert. denied, 404 U.S. 853, 92 S.Ct. 94, 30 L.Ed. 2d 93 (1971); Menendez v. United States, 393 F.2d 312 (5 Cir. 1968), cert. denied, 393 U.S. 1029, 89 S.Ct. 639, 21 L.Ed.2d 572 (1969); McIntosh v. United States, 385 F.2d 274 (8 Cir. 1967). However, the legislative background at least indicates that Congress did not regard the use of interstate facilities for purposes other than travel or transportation as among the central targets of the Act.

a course of action foreseeable and even designed, the opinion indicates that the Act is not to be stretched to the limits of its language. The Court stated, 401 U.S. at 811, 91 S.Ct. at 1059, that the legislative history revealed "that §1952 was aimed primarily at organized crime and, more specifically, at persons who reside in one State while operating or managing illegal activities located in another." The warnings that "congress would certainly recognize that an expansive Travel Act would alter sensitive federal-state relationships" and "could overextend limited federal police resources," 401 U.S. at 812, 91 S.Ct. at 1059, are not without relevance here. These observations were reiterated in Erlenbaugh v. United States, 409 U.S. 239, 247 n. 21, 93 S.Ct. 477, 34 L.Ed.2d 446 (1972).

Of our own decisions under the Travel Act, the most illuminating for present purposes is United States v. Corallo, 413 F.2d 1306 (2 Cir.), cert. denied, 396 U.S. 958, 90 S.Ct. 431, 24 L.Ed.2d 422 (1969). Although that case, like this one, involved corruption of a local official, the evidence there disclosed numerous telephone calls from New York to Connecticut for the very purpose of arranging the bribe and distributing the proceeds among the conspirators, 413 F.2d at 1315. On that basis Judge Medina concluded, 413 F.2d at 1325, that "the extensive references in the record to interstate telephone calls that were actually made justify the inference that the use of interstate telephone calls was not a casual and incidental occurrence but the fulfillment of an integral part of the conspiratorial consensus." In United States v. DeSapio, 435 F.2d 272 (2 Cir. 1970), cert. denied, 402 U.S. 999, 91 S. Ct. 2170, 29 L.Ed.2d 166 (1971), the interstate acts were much less numerous, see 435 F.2d at 275-276, 278, but one of them, the meeting at Fried's horsefarm, which was reached by interstate travel at his suggestion, was the occasion when, on the Government's proof, the entire conspiracy was hatched.[11] In

11. Examination of the briefs in the *DeSapio* appeal confirms the writer's recollection that no issue concerning the applicability of the Travel Act was raised. This was also true in United States v. Pordum, 451 F.2d 1015 (2 Cir. 1971), cert. denied, 405 U.S. 998, 92 S.Ct. 1249, 31 L.Ed.2d 467 (1972).

United States v. Cassino, 467 F.2d 610, 613-614 (2 Cir. 1972), cert. denied, 410 U.S. 928, 93 S.Ct. 1363, 35 L.Ed.2d 590 (1973), several of the conspirators engaged in weekly travel from New York to New Jersey for meetings in furtherance of the conspiracy. Finally, in our most recent encounter with the Travel Act, United States v. Kahn, 472 F.2d 272, 285 (2 Cir. 1973), where there was extensive interstate travel and use of the mails, Judge Smith distinguished *Rewis* and the Seventh Circuit decisions cited below on the ground that in them "the defendants themselves engaged in no interstate activities, and that the total interstate travel aspect of the enterprises was either marginal or unforeseen."

Of the other circuits the Seventh has had most to say concerning how purposeful and important to the enterprise the use of interstate facilities must be. United States v. Altobello, 442 F.2d 310 (7 Cir. 1971), held it was not enough that a Philadelphian who was the victim of extortion in Chicago gave as part payment the proceeds of a check he cashed on a Philadelphia bank, which cleared through the mails.[12] In United States v. McCormick, 442 F.2d 316, 318 (7 Cir. 1971), an Indiana lottery operator advertised in a local newspaper for salesmen, and some copies of the newspaper were mailed out of the state. The court again refused to permit application of the Travel Act, finding that "the activities engaged in by defendant were essentially local" and that the role played by the interstate mailings was "a matter of happenstance" and "minimal and incidental" to the operation of the illegal lottery. The decision in

12. The Fourth Circuit cases seem contra on this point. United States v. Salsbury, 430 F.2d 1045 (4 Cir. 1970), held that cashing out-of-state checks, with knowledge that they would be cleared through the mails was sufficient to invoke the statute. This followed the earlier decision in United States v. Wechsler, 392 F.2d 344 (4 Cir.), cert. denied, 392 U.S. 932, 88 S.Ct. 2283, 20 L.Ed.2d 1389 (1968) ("When one deposits a check, there would seem to be little doubt that he is using a facility in interstate commerce." *Id.* 392 F.2d at 347 n.3).

United States v. Lee, 448 F.2d 604, 607 (7 Cir. 1971), cited by the Government, indicates no contrary view; in that case employees of an Indiana gambling establishment regularly crossed state lines, and the court distinguished both *Altobello* and *Rewis* by pointing to the "continual interstate travel by employees of the illegal venture." Two cases from other circuits holding the interstate aspect insufficient are United States v. Hawthorne, 356 F.2d 740 (4 Cir.), cert. denied, 384 U.S. 908, 86 S.Ct. 1344, 16 L.Ed.2d 360 (1966) [moving self and family from Indiana to West Virginia where illegal gambling enterprise was to be undertaken]; and United States v. Judkins, 428 F.2d 333 (6 Cir. 1970) [calls from Arkansas to appellant's house of prostitution in Tennessee not shown to have a business purpose].

It is with this background that we consider the three telephone calls which the Government claims to have brought this case within 18 U.S.C. §1952(a)(3).

[5, 6] We begin by discarding Klein's return of Bario's calls from Newark on the morning of April 27. Whatever Congress may have meant by §1952(a)(3), it certainly did not intend to include a telephone call manufactured by the Government for the precise purpose of transforming a local bribery offense into a federal crime. In view of the totally fabricated nature of this episode, it is immaterial that Klein returned the call rather than receiving it as the Government had plotted. The Government's reliance on United States v. Edwards, 366 F.2d 853, 867-868 (2 Cir. 1966), cert. denied, 386 U.S. 908, 87 S.Ct. 852, 17 L.Ed. 2d 782 (1967), is misplaced. There this court found that the participants "never considered themselves limited by New York boundaries" and indeed had suggested that the stolen securities be disposed of outside New York; moreover, the issue of the manufacture of federal jurisdiction had not been raised at trial. It is not a sufficient answer that if the issue here were simply one of entrapment, the jury would have been justified in finding, under the entirely correct instruction on the subject given by the

judge, that Klein had a propensity for crime, requiring no encouragement from the federal agents. Our holding is rather that when Congress responded to the Attorney General's request to lend the aid of federal law enforcement to local officials in the prosecution of certain crimes, primarily of local concern, where the participants were engaging in interstate activity, it did not mean to include cases where the federal officers themselves supplied the interstate element and acted to ensure that an interstate element would be present. Manufactured federal jurisdiction is even more offensive in criminal than in civil proceedings, cf. 28 U.S.C. §1359. As the late Judge Freedman said with respect to civil actions in McSparran v. Weist, 402 F.2d 867, 873 (3 Cir. 1968) (en banc) cert. denied, 395 U.S. 903, 89 S.Ct. 1739, 23 L.Ed. 2d 217 (1969), manufactured jurisdiction "is a reflection on the federal judicial system and brings it into disrepute."

Similar considerations lead us to reject the Government's reliance on Wasserberger's unsuccessful attempts to reach Bario in Las Vegas. Those calls also resulted from a plant by the Government — in this instance a plant of misinformation which provoked interstate telephone calls that Wasserberger would not otherwise have made.[13] An additional ground for ruling out the abortive Las Vegas calls is that there was not and, under the circumstances, could not have been any actual use of a facility in interstate commerce which would in fact promote, etc., any

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13. The Government contends that Bario gave Wasserberger the Sahara Hotel information "only after great pressure by Wasserberger and Klein to furnish a number." According to Bario's testimony, however, when Klein requested a number to call, Bario said that Wasserberger would know how to get in touch with him, and when Wasserberger asked for a number, Bario readily spun out the tale about leaving messages at the Sahara Hotel. Since the Government's assertion that the hotel story was invented "solely to maintain the credibility of Agent Bario as a Las Vegas mobster" is nowhere supported in the record, we need not decide whether the considerations mentioned in this footnote would lead to a different result if factually sustained.

unlawful activity. When Bario told Wasserberger that he could be reached at the Sahara Hotel, he knew that any attempt to reach him at the hotel would be frustrated. We refuse to construe the "intent" language of §1952 so broadly as to include a call to an innocent telephone operator who had not the faintest idea of what was afoot.[14]

We are thus left only with Bario's call from Paris on April 25. That call was not planted in the sense that the Newark call was; the Government did not send Bario abroad for the sole purpose of making a foreign call. But, apart from the question, which we leave unresolved, whether a communication with an undercover agent can ever meet the requirement of §1952(a), the Paris call rather precisely fits Judge Medina's characterization in United States v. Corallo, *supra,* 413 F.2d at 1325, of "a casual and incidental occurrence" and Mr. Justice Marshall's reference in *Rewis, supra,* 401 U.S. at 812, 92 S.Ct. at 1059, 28 L.Ed.2d 493, to "a matter of happenstance." The call served no purpose that would not have been equally served by a call from New York; the most that can be said is that when the defendants made their despicable agreement with Bario, they were told he might be calling from across the Atlantic rather than the East River — a matter of complete indifference to them. Beyond all this is the question whether the *receipt* of an interstate or foreign telephone call, in no way initiated by a defendant, even though expected by him, is any more a violation of the Travel Act than the reception of Georgia gamblers by the Florida operators in *Rewis, supra,* 401 U.S. 808, 91 S.Ct. 1056, 28 L.Ed.2d 493. In light of the principles controlling our decision, which we summarized at the conclusion of our discussion of the legislative history of the Travel Act, we hold that the Paris call was insufficient to transform this sordid, federally provoked incident of local corruption into a crime against the United States.

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14. We do not mean the foregoing to be taken as indicating that we would reach a different conclusion with reference to the Las Vegas calls if the operator had passed them on to Bario; we simply need not decide that issue.

Opinion of the Court of Appeals (486 F.2d 670)

The convictions are reversed for insufficiency of the evidence to show a violation of, or a conspiracy to violate, the Travel Act, with instructions to dismiss the indictment.

OPINION OF APPELLATE DIVISION ON ARTICLE 78 PROCEEDING TO DISMISS INDICTMENT

44 A.D.2d 465

In the Matter of Frank R. KLEIN, Petitioner, v. Honorable John M. MURTAGH and Maurice Nadjari, Special Prosecutor, Respondents, Norman Archer, Intervenor.

In the Matter of Leon WASSERBERGER, Petitioner, v. The JUSTICES OF the NEW YORK SUPREME COURT OF QUEENS COUNTY et al., Respondents, Norman Archer, Intervenor.

Supreme Court, Appellate Division, Second Department.

May 20, 1974.

Two Article 78 proceedings in nature of prohibition seeking to prevent state prosecutions, on ground that petitioner has been previously placed in double jeopardy by virtue of federal prosecution. The Supreme Court, Appellate Division, Munder, J., held that where prior federal conviction for violating the Travel Act was reversed for insufficiency of evidence, subsequent state prosecutions for conspiracy in third degree, bribery, bribe receiving, rewarding official misconduct and receiving award for official misconduct would not violate constitutional or statutory proscriptions against double jeopardy, notwithstanding that federal and state prosecutions were based on same act or criminal transaction, that an offense must be the same in law and fact to violate statutory proscription against prosecuting a person twice for the same offense and that statute providing that a person may be separately prosecuted for two offenses based on the same act if one of the offenses was based on violation of statutory provisions of another jurisdiction and was terminated by court order founded on insufficiency of evidence is not unconstitutional as denying equal protection.

Petitions dismissed.

Opinion of Appellate Division (44 A.D.2d 465)

Shapiro, Acting P.J., filed concurring opinion in which Cohalan and Munder, JJ., concurred; Christ, J., dissented and filed opinion in which Benjamin, J., concurred.

MUNDER, Justice.

The proceeding by petitioner Frank R. Klein, pursuant to article 78 of the CPLR in the nature of prohibition, is to prevent the respondents from prosecuting him under an indictment returned by the Extraordinary Special Grand Jury in Queens County. Two others also named in the indictment, Leon Wasserberger and Norman Archer, are seeking the same relief. Wasserberger has brought a separate article 78 proceeding and Archer has made motions to intervene in the two proceedings. Since the three individuals, their contentions and the relief they seek are intertwined, we have consolidated the two article 78 proceedings and granted Archer's motions to intervene.

The issue presented is whether prosecution of these three individuals under the Queens indictment is barred by reason of double jeopardy.

Prior to the return of the indictment under consideration here, Klein, Wasserberger and Archer were indicted by Federal authorities for alleged violation of section 1952 of title 18 of the United States Code, the so-called Travel Act. They were tried and convicted by a jury in the United States District Court for the Southern District of New York on January 29, 1973. The convictions, however, were overturned by the Court of Appeals, Second Circuit, with instructions that the indictment be dismissed (United States v. Archer, 486 F.2d 670). The Court of Appeals, in a sharp opinion by Judge Friendly, made very clear that the basis for reversal was the prosecution's failure to provide the "Federal" element of the crime charged, i.e., that the Government had failed to establish that the defendants "used a facility in interstate or foreign commerce, for the purposes listed

in §1952(a)(3), in a sufficiently meaningful way to subject themselves to liability under the statute" (p. 680).

[1-3] The petitioners and the intervenor contend in this court that to permit the State prosecution to continue will subject them to a second prosecution for the "same offense" in violation of the Federal and State Constitutions, as well as CPL 40.20. This is not so. We need not engage in any painstaking comparison between the two indictments to reach the conclusion that the overt acts or transactions for which Klein and the others were tried in the Federal court are substantially the same as those for which they now face trial under the Queens indictment. But that does not mean the offenses charged are the same offenses as that term is used in the context of double jeopardy. Subdivision 1 of CPL 40.20 prescribes the New York double jeopardy doctrine in its purest and simplest form. It states that "a person may not be twice prosecuted for the same offense." This means the same in both fact and law (see Practice Commentary in McKinney's Consol. Laws of N.Y., Book 11A, CPL §§1 to 169, p. 105; Rothblatt, Criminal Law of New York, p. 57). It is interesting, in fathoming legislative intent, to see that a preliminary draft of the Criminal Procedure Law contained a provision defining "same offense" as two prosecutions "based upon a violation of the same statutory provision and upon the same facts" (see CPL 20.10, subd. 1; Proposed New York Criminal Procedure Law, 1967 draft, prepared by the Temporary Commission on Revision of the Penal Law and Criminal Code). In subdivision 1 of CPL 40.10 the term "offense" is defined as "committed whenever any conduct is performed which violates a statutory provision defining an offense; and when the same conduct or criminal transaction violates two or more such statutory provisions each such violation constitutes a separate and distinct offense. . . ."

At bar, the prosecutions are not the same in law because they are based upon separate and distinct statutes, namely, section 1952 of title 18 of the United States Code and sections

105.05, 200.00, 200.10, 200.20, 200.25 of the New York Penal Law. What is really happening is that the petitioners are being prosecuted for *two* different offenses based upon the same act or criminal transaction. Under the circumstances of this case, the second prosecution is *not* violative of any constitutional or statutory protection.

The Supreme Court of the United States squarely held in Bartkus v. Illinois, 359 U.S. 121, 79 S.Ct. 676, 3 L.Ed.2d 684, that an acquittal in a Federal court of an alleged violation of a Federal statute, followed by prosecution in a State court, under State law, for the same acts, is not violative of the Fifth Amendment proscription against double jeopardy. In a companion case, Abbate v. United States, 359 U.S. 187, 79 S.Ct. 666, 3 L.Ed.2d 729, the court held that the converse was also true, namely, a prior State prosecution did not bar a subsequent Federal prosecution for the same acts. To prohibit a State from prosecuting a defendant after a Federal prosecution would, to use the words of Mr. Justice Frankfurter in speaking for the majority in *Bartkus,* "be a shocking and untoward deprivation of the historic right and obligation of the States to maintain peace and order within their confines. It would be in derogation of our federal system to displace the reserved power of States over state offenses by reason of prosecution of minor federal offenses by federal authorities beyond the control of the States" (Bartkus v. Illinois, *supra,* 359 U.S. p. 137, 79 S.Ct. p. 685). The doctrine underlying *Bartkus* and *Abbate* is known as separate or dual sovereignty (see 3 Wharton's Criminal Evidence [13th ed.], §661).

The doctrine has *not* been discarded by the Supreme Court despite cases such as Benton v. Maryland, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707, which held the double jeopardy provisions of the Fifth Amendment to be applicable to the States, and Murphy v. Waterfront Comm. of N.Y. Harbor, 378 U.S. 52, 84 S.Ct. 1594, 12 L.Ed.2d 678, which held the granting of immunity

by a State to a witness in a State prosecution prohibited the Federal Government from using the witness' testimony in a Federal prosecution. These decisions have been cited by some as evidence that dual sovereignty has come into "serious question" or is experiencing some erosion (see Pitler, New York Criminal Practice Under the CPL, p. 63; Martin v. Rose, 6 Cir., 481 F.2d 658, 660), but the fact remains that it is still a viable doctrine. It was recently acknowledged, although not specifically passed upon, in Waller v. Florida, 397 U.S. 387, 394, 90 S.Ct. 1184, 25 L.Ed.2d 435 and, as stated in Martin v. Rose, 481 F.2d 658, 660, "* * * we find that the Federal courts still recognize and affirm the continuing validity of Bartkus * * * [citations omitted]."

On this point, the Court of Appeals for the Second Circuit recently stated in United States v. Barone, 467 F.2d 247, 250:

> "Appellants also claim that they were twice placed in jeopardy by being subjected to trial in a federal court after they were convicted of the same gambling offenses in a prior state proceeding. This argument is conclusively foreclosed by Abbate v. United States, 359 U.S. 187, 79 S.Ct. 666, 3 L.Ed.2d 729 (1959), and, contrary to appellants' argument, we find no evidence that the holding of that case has been 'eroded'."

In an earlier case in which the double jeopardy argument was similarly raised by a defendant complaining of successive State and Federal prosecutions, the Court of Appeals for the Second Circuit in United States v. Feinberg, 383 F.2d 60, 71, cert. den. sub nom., Feinberg v. United States, 389 U.S. 1044, 88 S.Ct. 788, 19 L.Ed.2d 836, said:

> "The first branch of this argument may be summarily dismissed by noting that neither of the essential elements of a plea of double jeopardy,

i.e., *an identity of successive sovereigns,* Abbate v. United States, 359 U.S. 187, 79 S.Ct. 666, 3 L.Ed.2d 729 (1959); United States v. Wapnick, 315 F.2d 96 (2 Cir. 1963), cert. denied, 374 U.S. 829, 83 S.Ct. 1868, 10 L.Ed.2d 1052 (1965), and an identity of alleged offenses, 2 Wharton's Criminal Evidence, §§650, n. 20 (1966 Supp.), 653; Williams v. United States, 179 F.2d 644, 649 (5 Cir. 1950); United States v. Kramer, 289 F.2d 909, 913 (2 Cir. 1961), are present here" [emphasis added].

The court also rejected a claim of collateral estoppel, which is often intertwined with double jeopardy (see Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469), with the following comments (United States v. Feinberg, *supra,* 383 F.2d p. 71):

> "While the doctrine of collateral estoppel is indeed applicable to criminal cases, Sealfon v. United States, 332 U.S. 575, 578, 68 S.Ct. 237, 92 L.Ed. 180 (1948), the party estopped from relitigating the same issues must have been a party to the initial litigation * * * [citations omitted]. *There is insufficient identity of interest between the state and federal governments in prosecuting intrastate and interstate offenses,* respectively, United States v. Sutton, 245 F.Supp. 357, 359-360 (D.Md.1965), *to warrant treating the Government here as a party, or even as privy, to appellant's initial litigation which resulted in the prior acquittal in the state court"* [emphasis added].

In addition to the Fifth Amendment to the Federal Constitution, the protection of the individual against double jeopardy is also preserved by our State Constitution (N.Y.

Const., art. I, §6). It is left to the State Legislature, however, to precisely define the concept and to prescribe the circumstances or kinds of situations to which it applies (People v. Fernandez, 43 A.D.2d 83, 87, 349 N.Y.S.2d 774, 777). That has been done in CPL 40.20. As noted above, subdivision 1 of that section contains the double jeopardy concept in its most basic form: "A person may not be twice prosecuted for the same offense." For the reasons stated above, I do not believe that subdivision is applicable. Subdivision 2 of that section provides that "a person may not be separately prosecuted for two offenses based upon the same act or criminal transaction unless * * * " the situation falls within one of six enumerated exceptions (pars. [a] to [f], inclusive).

In my view, the situation at bar falls within the exception spelled out in paragraph (f) and for that reason double jeopardy is not present. Paragraph (f) states, in effect, that a person *may* be separately prosecuted for two offenses based upon the same act or criminal transaction if:

> "One of the offenses consists of a violation of a statutory provision of another jurisdiction, which offense has been prosecuted in such other jurisdiction and has there been terminated by a court order expressly founded upon insufficiency of evidence to establish some element of such offense which is not an element of the other offense, defined by the laws of this state."

That is exactly what occurred here. The Federal offense was terminated by the United States Court of Appeals expressly upon the ground of insufficient evidence to show use of interstate facilities, which is not an essential element of the crimes for which the petitioners are being prosecuted under the State Penal Law. Under these narrow circumstances, subsequent

prosecution in the New York courts is permitted (see Practice Commentary in McKinney's Consol. Laws of N.Y., Book 11A, CPL §§1 to 169, p. 108).

[4] The petitioners and the intervenor contend that paragraph (f) is unconstitutional because it denies them equal protection of the law. They claim they are treated differently than a defendant who is acquitted by a jury. That may be so, but that does not make the treatment given to them unconstitutional. Strictly speaking, in view of the doctrine of dual sovereignty, New York is constitutionally free to prosecute a defendant despite a prior Federal prosecution. The same act obviously may constitute two offenses, one against the United States and one against New York. Factually, the New York courts do not recognize the dual sovereignty doctrine, but this is due to statutory law, not the constitution (see People v. Lo Cicero, 14 N.Y.2d 374, 251 N.Y.S.2d 953, 200 N.E.2d 622; see also, Matter of Abraham v. Justices of N.Y. Supreme Ct. of Bronx County, 43 A.D.2d 414, 352 N.Y.S.2d 451). That New York has expanded the constitutional protection against double jeopardy, by statute, is to its credit, but the fact that some persons benefit by this expansion, while the three individuals at bar do not, is no basis for a claim that they are being denied constitutional rights. By enacting CPL 40.20, the Legislature has given statutory protection to some who do not come within the umbrella of the Fifth Amendment. By listing six specific exceptions, the Legislature made clear, however, that it was not giving *carte blanche* to all. Since the instant case clearly comes within paragraph (f), and since paragraph (f) cannot be unconstitutional because it is beyond what the Supreme Court of the United States in *Bartkus* and *Abbate (supra)* has declared is required there is no other conclusion but that the attempt to prohibit the State prosecution should be rejected.

Klein, Wasserberger and Archer cite several New York cases, including some recent ones decided by this court, to

support the claim of double jeopardy (e.g., People v. Lo Cicero, *supra;* Matter of Brighenti v. Judges of New York Supreme Ct. of Richmond County, 41 A.D.2d 209, 342 N.Y.S.2d 123; Matter of Cirillo v. Justices of the Supreme Ct. of State of N.Y., 43 A.D.2d 4, 349 N.Y.S.2d 129; People v. Fernandez, 43 A.D.2d 83, 349 N.Y.S.2d 774). These cases are not in point since none of them dealt with the specific paragraph (f) with which we are here concerned. For instance, in People v. Lo Cicero (*supra*) the issue was whether a prior Federal prosecution (and acquittal) for obstructing by robbery the movement of goods in interstate commerce (U.S.Code, tit. 18, §1951) came within the provisions of section 33 of the former Penal Law and section 139 of the former Code of Criminal Procedure, so as to bar a subsequent State prosecution arising out of the same transaction. Both statutes, in effect, barred prosecutions in New York when there had been a prior conviction or acquittal in another state, territory or country. It was held that "the United States comes within the definition of 'another state or country' as used in the two relevant statutes", and that therefore double jeopardy did attach (People v. Lo Cicero, 14 N.Y.2d 374, 379, 251 N.Y.S.2d 953, 956, 200 N.E.2d 622, 624, *supra*). Neither statute contained any exception to the rule or protection contained therein and the court made clear that it was not inclined "to narrow its application by exceptions based on an ambiguity of statutory draftsmanship" (People v. Lo Cicero, *supra,* p. 378, 251 N.Y.S.2d p. 956, 200 N.E.2d p. 624). This is in sharp contrast with CPL 40.20, which precisely defines the double jeopardy rule in New York and the situations to which it applies. The exception specified in paragraph (f) of subdivision 2 of CPL 40.20 is one situation in which the rule does *not* apply.

In Matter of Brighenti v. Judges of New York Supreme Ct. of Richmond County, 41 A.D.2d 209, 342 N.Y.S.2d 123, *supra,* there was no consideration whatsoever of any of the exceptions of subdivision 2 of CPL 40.20. The sole question was whether a Federal conviction under subdivision (e) of section 2113 of title

18 of the United States Code, i.e., bank robbery involving forcible accompaniment without consent (kidnapping), barred a subsequent prosecution in New York charging kidnapping under sections 135.25 and 135.20 of the Penal Law. We held, in an opinion by Mr. Justice Brennan, that prosecution was barred because there was "substantial identity" (p. 212, 342 N.Y.S.2d p. 126) between the Federal crime (for which the petitioners had been convicted and incarcerated) and the State crime for which New York sought to bring them to trial.

In People v. Fernandez (43 A.D.2d 83, 90, 349 N.Y.S.2d 774, 781, *supra*), which involved an attempt at successive State prosecutions—not Federal and State—the opinion written by Mr. Justice Hopkins for a unanimous court thoroughly examined several of the exceptions under subdivision 2 of CPL 40.20 and found *none* of them applicable. That being so, we reversed a conviction for crimes arising out of the same incident for which the defendant had previously been acquitted, and dismissed the indictment on the ground of double jeopardy.

In Matter of Cirillo v. Justices of the Supreme Ct. of State of N.Y., 43 A.D.2d 4, 349 N.Y.S.2d 129, *supra*, this court considered the application of paragraph (c) of subdivision 2 of CPL 40.20. That paragraph provides that a person may not be prosecuted for two offenses based upon the same act or criminal transaction *unless* "one of such offenses consists of criminal possession of contraband matter and the other offense is one involving the use of such contraband matter, *other than a sale thereof*" [emphasis added]. The petitioner, Cirillo, had been convicted in a Federal court under a multicount indictment charging possession with intent to distribute and distribution of heroin on or about January 18, 1973, and an attempt to distribute heroin and conspiracy to distribute heroin on or about March 15, 1973. The court carefully compared the Federal charges with those for which the petitioner stood indicted in New York and concluded that two of the three counts in the State indictment could not be prosecuted by reason of double

jeopardy, because they involved the same criminal transaction and involved a "sale" within the meaning of the language underscored above in paragraph (c) of subdivision 2 of CPL 40.20. The significant aspect about the *Cirillo* case is that we did not *completely* bar the subsequent State prosecution, for the concluding paragraph of Mr. Justice Shapiro's opinion noted as follows (p. 8, 349 N.Y.S.2d p. 132):

> "The third count of the State indictment charges criminal possession of a dangerous drug in the sixth degree, in that Cirillo unlawfully possessed *cocaine* on March 15, 1973. Since none of the counts in the Federal indictment deals with cocaine, the trial of Cirillo on that count of the Kings County indictment would not subject him to double jeopardy" [emphasis in original].

The above cases illustrate that the New York courts are very sensitive about and careful to protect against the subjection of a person to double jeopardy (see, also, Matter of Abraham v. Justices of N.Y. Supreme Ct. of Bronx County, 43 A.D.2d 414, 352 N.Y.S.2d 451, *supra*). But where, as here, by paragraph (f) of subdivision 2 of CPL 40.20 the Legislature has specifically authorized a second prosecution where the prior prosecution by another sovereign jurisdiction has been terminated expressly because of the insufficiency of evidence required to establish an element of the crime in the other jurisdiction, and that element is not essential in the prosecution in this State, our courts should not preclude it.

For the reasons set out above, the petitions should be dismissed on the merits, without costs.

Petitions dismissed on the merits, without costs.

SHAPIRO, Acting P.J., and COHALAN, J., concur.

Opinion of Appellate Division (44 A.D.2d 465)

SHAPIRO, Acting P.J., with a separate opinion, in which COHALAN and MUNDER, JJ., concur.

CHRIST, J., dissents and votes to grant the petitions, with an opinion, in which BENJAMIN, J., concurs.

SHAPIRO, Acting Presiding Justice (concurring).

I concur in the carefully considered opinion of Mr. Justice MUNDER, but I should like to make it clear that in dismissing the petitions we have not reached or passed upon the petitioners' contention that the lawless conduct of the investigators in this case is so offensive to the administration of justice and to prevailing standards of decent behavior that this prosecution should be barred.

While I am in general agreement with the disapproval voiced by Judge Friendly in United States v. Archer, 2 Cir., 486 F.2d 670, of the prosecutorial conduct of the Government (both State and Federal), the question of whether such conduct constituted government induced criminality (Sherman v. United States, 356 U.S. 369, 78 S.Ct. 819, 2 L.Ed.2d 848), or was otherwise of such a nature as to violate principles of fundamental fairness sufficient to preclude the prosecution of the petitioners (Rochin v. California, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183), or whether the indictment should be dismissed in the interest of justice (CPL 210.40), should be decided at the trial level on a full record containing all the essential facts showing the manner in which the events leading to the prosecution of the petitioners were planned and carried out. The determination of those questions cannot properly be made on an application for an order in the nature of prohibition.

COHALAN and MUNDER, JJ., concur.

CHRIST, Justice (dissenting).

Opinion of Appellate Division (44 A.D.2d 465)

The Fifth Amendment to the Constitution of the United States provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb". This has become commonly known as a prohibition against double jeopardy and is applicable to the States through the Fourteenth Amendment (Benton v. Maryland, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707). The protection of the individual against double jeopardy is also safeguarded by our own State Constitution (N.Y.Const., art. I, §6); and, where a defendant in a criminal action will be put in double jeopardy by a second prosecution of the same offense, a writ of prohibition will issue to bar the second prosecution (Matter of Kraemer v. County Court of Suffolk County, 6 N.Y.2d 363, 189 N.Y.S.2d 878, 160 N.E.2d 633; Matter of Ferraro v. Supreme Court, County of Queens, 36 A.D.2d 841, 321 N.Y.S.2d 842). The facts here set forth compel the issuance of a writ of prohibition.

The two-count Federal indictment under which the petitioners were previously tried charged a violation of section 1952 of title 18 of the United States Code, also known as the Travel Act, and a conspiracy to commit the same. In essence, the Travel Act makes it a Federal crime to travel, or use any facility, in interstate or foreign commerce, to promote any "unlawful activity". The term "unlawful activity" is defined to include bribery in violation of the laws of the State in which committed. The Federal indictment here alleged a conspiracy to use and unlawful use of a facility in interstate and foreign commerce, to wit, the telephone, with intent to promote and carry on an unlawful activity, to wit, bribery in violation of sections 200.00 and 200.10 of the New York State Penal Law. Thus, because of the very nature and language of the Travel Act, the Federal indictment necessarily charged, and, more important, the evidence upon the Federal trial necessarily proved, the express violation of the bribery provisions of the New York State Penal Law. Indeed, the express basis of this Federal prosecution was a *State* crime, which allegedly became a Federal offense only

because the telephone was used to aid in committing it, the calls, themselves, not constituting any independent crime.

The subsequent reversal of the petitioners' convictions and the dismissal of the indictment being based solely upon the failure to prove a crime against the United States, it is manifest that the instant State indictment now charges the "same offense" as that upon which the petitioners were tried and convicted in the Federal District Court. Since any further prosecution of the former will subject the petitioners to double jeopardy in violation of their constitutional and statutory rights (U.S. Const., 5th Amdt.; N.Y. Const., art. I, §6; CPL 40.20, subd. 1), an order in the nature of prohibition should issue. The exception to the bar against successive prosecutions embraced by the majority herein is simply inapplicable to the peculiar facts of this case.

Fundamental fairness demands that a prohibition order issue. The bar against successive prosecutions for the same act or criminal transaction, much less for the same offense, is the general rule in this State, not the exception (CPL 40.20). It is, of course, undisputed that the State and Federal indictments are based upon the same act or criminal transaction and it was conceded, upon oral argument, that the evidence upon the State trial will be almost identical to that presented upon the Federal trial. The great power of the State and Federal governments, respectively, to compel an individual to defend himself before the bar of criminal justice does not legitimize the old adage: If at first you don't succeed, try, try again. The petitioners have already once been forced to defend themselves on the very charge now alleged in the State indictment. That was a lengthy and, no doubt, expensive trial. Now, they are faced with another lengthy and expensive trial in a State court and, perhaps, further appeals, too. To permit this second prosecution to proceed would be totally unjust, especially as, to use the words of the Second Circuit Court of Appeals, the Federal Government,

itself, "set up" this crime by "causing the bribery of a state assistant district attorney by a scheme which involved lying to New York police officers and perjury before New York judges and grand jurors" (United States v. Archer, 486 F.2d 670, 672). The petitioners have a constitutional right "not to be harassed, or perhaps even impoverished, by successive prosecutions for the same offense" (Matter of Ferlito v. Judges of County Court, Suffolk County, 39 A.D.2d 17, 21, 331 N.Y.S.2d 229, 233, affd., 31 N.Y.2d 416, 340 N.Y.S.2d 635, 292 N.E.2d 779).

BENJAMIN, J., concurs.

COURT OF APPEALS AFFIRMANCE OF ORDER DENYING ARTICLE 78 RELIEF

34 N.Y.2d 988

In the Matter of Frank R. KLEIN, Appellant, v. Hon. John M. MURTAGH and Maurice Nadjari, Respondents.

In the Matter of Leon WASSERBERGER, Appellant v. JUSTICES OF the NEW YORK SUPREME COURT OF QUEENS COUNTY et al., Respondents, Norman Archer, Intervenor-Appellant.

Court of Appeals of New York,

Sept. 18, 1974.

Judgment affirmed, without costs, on the opinion by Mr. Justice Fred J. Munder at the Appellate Division, 44 A.D.2d 465, 355 N.Y.S.2d 622.

BREITEL, C.J., and GABRIELLI, JONES, WACHTLER, SAMUEL RABIN, STEVENS and WITMER, JJ., concur.

Supreme Court, U. S.
FILED
JUL 21 1980
JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1990

NORMAN ARCHER,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

October Term, 1980

No. 80-5026

LEON WASSERBERGER,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Petitions for Writs of Certiorari to the Court of Appeals of the State of New York

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

Preliminary Statement

The respondent, the People of the State of New York, respectfully requests that this Court deny the petitions for writs of certiorari seeking review of the judgments of the Court of Appeals of the State of New York in these cases, dated April 24, 1980.

Statement of the Case

In pursuit of his investigation into corruption in the New York City criminal justice system—an investigation undertaken at the behest of the Knapp Commission* prior to the creation of the office of the Special State Prosecutor —the United States Attorney for the Southern District of New York devised a plan which was intended to ferret out any existent wrongdoing. Specifically, it was decided after careful consideration of viable alternatives, that a scenario would be created whereby an undercover agent, after acting out the precise elements constituting a weapons possession offense, would be arrested for such crime in Queens County by a New York City police officer assigned by the Police Commissioner and acting in cooperation with the federal investigation. The agent's "case" would then be processed in the criminal justice system as would that of any other arrestee in Queens County. The plan was carried out.

After his "arrest", the undercover agent was introduced by a federal informant to petitioner Leon Wasserberger, a Manhattan bailbondsman, and through Wasserberger, to Frank Klein, an experienced criminal attorney practicing in Queens County. Based upon Klein's subsequent representations that an Assistant District Attorney with whom he had consulted had decided that the case would have to be fixed in the grand jury, the undercover agent, with Klein's preparation, and with the carefully considered concurrence of the agent's supervisors, appeared before a Queens County grand jury and was questioned by the pe-

* The Knapp Commission was a Mayoral Commission appointed in the early 1970's and charged with examining allegations of widespread corruption in the New York City Police Department.

titioner Norman Archer, then chief of the Indictment bureau of the Queens County District Attorney's office. The agent, as ordered by the U.S. Attorney, only testified to the precise story created by Klein, and the grand jury, subsequent to Archer's instructions, returned no true bill.

In a federal indictment filed in July, 1972, Archer, Klein and Wasserberger were accused by a grand jury sitting in the Southern District of New York of violating 18 U.S.C. §1952, the Travel Act. The indictment specified that the defendants used interstate telephone facilities in order to effectuate a conspiracy to commit, and did commit, the state crime of bribery, a bribery involving the exchange of a substantial sum of money for an assurance that the Queens County grand jury would not vote to indict the undercover agent for the possession of weapons—the "case" which had been "created" by the federal investigators. On January 29, 1973, the defendants were convicted after a jury trial in the United States District Court for the Southern District of New York and were sentenced to terms of imprisonment on March 14, 1973.

On appeal, the United States Court of Appeals for the the Second Circuit reversed the convictions with instructions to dismiss the indictment in view of its conclusion that a federal crime had not been established (486 F.2d 670 [2nd Cir. 1973]). In so holding, the court took occasion to question the tactics of the federal authorities in arranging the "crime" which later became the subject of the "fix". Such criticism was later muted, however, upon the Government's motion for re-argument where for the first time, the facts underlying the investigation were articulated (see 486 F.2d at 683).

Subsequently, under a state indictment filed in Queens County, Archer, Wasserberger and Klein were charged by an Extraordinary Term Grand Jury with the crimes of conspiracy, bribery, and receiving reward for official misconduct—offenses arising out of the same acts underlying the federal prosecution. Thereafter, a proceeding which had been brought in the Appellate Division, in the nature of prohibition, was dismissed on the merits, the court holding that the pending state prosecution would neither place the defendants in double jeopardy nor violate the statutory provisions of New York Criminal Procedure Law §40.20 (2) (McKinney 1971). In a concurring opinion, it was further indicated that as far as the issue of the investigative technique was concerned, such a proceeding was not an appropriate vehicle for review, and that the matter should best be attended to at the trial level where a record could be made "containing all the essential facts showing the manner in which the events leading to the prosecution of the petitioners were planned and carried out" (48a).* The New York Court of Appeals later affirmed that determination.

Acting pursuant to what he understood to be the Appellate Division's direction, the trial court thereafter conducted a hearing which was concerned with the propriety of the federal investigatory tactics. At the hearing, extensive testimony on the question was taken from the former United States Attorney, the former deputy counsel to the Knapp Commission who had later become a Special Assistant United States Attorney charged with directing the federal effort, and the former Police Commissioner.

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* Numerical References are to petitioner Archer's Appendix.

Briefly stated, the witnesses told of the findings of large scale incidents of corruption in the New York City criminal justice system which had been brought to the attention of the United States Attorney's office by the Knapp Commission, whereupon federal investigative assistance was solicited. It was disclosed to the federal prosecutor at the time that the cooperation of one Detective Robert Leuci, whose credibility had been substantiated by the strength of his revelations, had indicated the need for such a federal undertaking.

Subsequently, after carefully considering all alternative investigative approaches which in the past had been successful, the federal authorities decided to utilize the services of an undercover agent who would be "arrested" for a weapons possession offense* in Queens County—an area upon which compelling allegations of official improprieties had focused. The plan, which called for the case to proceed in the Queens County criminal justice system, was implemented with the approval of the Police Commissioner and the knowledge of the then Chief Judge of the State of New York.

The tactics called for the undercover operatives to specifically act out the "crime" and the "arrest" so that, in effect, all subsequent representations by the police officer involved would be based on actual observations. Although it was the investigators' intention to ascertain whether any "fix" might thereafter be effectuated, it remained their

* A possession offense was decided upon since it involved a minimal amount of persons thereby avoiding the possibility of entrapment, and the fact of weapons avoided the danger inherent in the handling of narcotics.

hope that such opportunities for corruption might not be present. No specific target, certainly not the petitioners, was contemplated.

When the time came where it became apparent that the undercover "defendant", at the behest of the co-conspirators, would need to relate a false story to the grand jury—a scenario not initially contemplated by the investigators—the authorities were placed in the position of deciding whether to proceed. In view of his promise to the Police Commissioner, however, of not restricting the investigation to police officers, and the responsibility to the public of determining whether or not allegations on the part of the chief of the Indictment bureau of the Queens County District Attorney's office were valid, the decision was made by the United States Attorney to go forward, albeit with certain constraints. It was thus directed that only the story created by the then targets be imparted to the grand jurors and that no recording or transmitting take place in the grand jury room.

The witnesses indicated that this was a federal investigation undertaken with the cooperation of city agencies and that since the Queens County District Attorney's office was itself under suspicion, it could not have been notified of the procedures under employment.

The court thereafter denied the motion to dismiss the charges on due process grounds. It was the court's observation, however, that with proper judicial safeguards, such as an investigative technique as that employed herein ". . . under appropriately compelling circumstances comes close to being indispensable in the investigation of corrup-

tion at levels that touch intimately the basic integrity of the criminal justice system."

Petitioner Archer thereafter went to trial* wherein the evidence showed, *inter alia,* that he instructed the grand jury during his presentation of the "case" that the seizure of the weapon had been improper, despite his having earlier told the arresting officer that the gun would be admissible; that he told the grand jury that the "accused's" gun permit had been verified in conformity with the story created by his co-conspirators; and that a subsequent search of petitioner's home gave rise to the discovery of part of the $15,000 which the undercover "defendant" had paid petitioner's co-conspirators for the "Fix".

Petitioner Archer was thereafter convicted of bribe receiving and receiving reward for official misconduct (New York Penal Law, former §§200.10 and 200.25 [McKinney, 1967]), and sentenced to three years' imprisonment,** execution of which sentence has been stayed pending the appellate process.

The Appellate Division subsequently affirmed the judgments amidst petitioners' due process and double jeopardy contentions (*People* v. *Archer,* 68 A.D. 2d 441, 417 N.Y.S.2d 507 [2nd Dept. 1979]), and the Court of Appeals then affirmed on the opinion of the intermediate court (see 49 N.Y.2d 978, —— N.E.2d ——, —— N.Y.S.2d —— [1980]).

* Petitioner Wasserberger pleaded guilty to the charges, and co-defendant Klein, for health reasons, was never tried.

** Petitioner Wasserberger was earlier sentenced to six months' imprisonment.

REASONS FOR DENYING THE WRITS

I

The doctrine of "Dual Sovereignty" remains unfettered and clearly supports the constitutional propriety of petitioners' subsequent state prosecution.

The mainstay of petitioners' initial attack upon the viability of their second prosecution—the first by the State of New York—is that the doctrine of "dual sovereignty" has been eroded by recent decisions of this court, and hence, that their rights against twice being placed in jeopardy have been abridged. Since petitioners' premise is totally devoid of judicial support, and since the New York courts have repeatedly stated that the state prosecution came within one of the enumerated exceptions to the state statutory "some transaction" rule (See New York Criminal Procedure Law, §40.20[2][f][McKinney 1971]; see also *Ashe* v. *Swenson,* 397 U.S. 436, 448-460 [1970], Brennan, J., concurring), the instant petitions raise no cognizable double jeopardy claim which needs to be reviewed by this court.

Indisputably, in *Bartkus* v. *Illinois,* 359 U.S. 121 (1965) and *Abbate* v. *United States,* 359 U.S. 187 (1965), this court, applying the doctrine of dual sovereignty, concluded that successive federal/state or state/federal prosecutions for respective offenses arising out of similar facts are not proscribed by the double jeopardy clause of the Fifth Amendment which was later held applicable to the states by virtue of the Fourteenth Amendment (*Benton* v. *Maryland,* 395 U.S. 784, [1969]). Moreover, the subsequently decided *Benton* case in no way detracted from the import of the *Bartkus/Abbate* rulings, in that the court merely concluded in the later decision that successive state/state prosecutions are likewise constitutionally prohibited.

Indeed, only recently, this court has had occasion to breathe renewed life into the dual sovereignty principle (see *United States* v. *Wheeler*, 435 U.S. 313, 317-318 [1978]) save for those instances where the "separate" sovereigns involved actually possessed inter-dependent or inter-related characteristics (see e.g., *Waller* v. *Florida*, 397 U.S. 387 [1970]). This viewpoint has received universal adherence on the part of other courts which have addressed the precise question (see e.g., *United States* v. *Aleman*, 609 F.2d 298, 309 [8th Cir. 1979]; *United States* v. *Taylor*, 603 F. 2d 732, 734 [8th Cir. 1979], *cert. denied*, 100 S.Ct. 487; *United States* v. *Hayes*, 589 F. 2d 811, 817-818 [5th Cir. 1979], *cert. denied*, 100 S.Ct. 93; *Hutul* v. *United States*, 582 F. 2d 1155, 1157 [7th Cir. 1978], *cert. denied*, 99 S.Ct. 1222; *Turley* v. *Wyrick*, 554 F. 2d 840, 840-841 [5th Cir. 1977], *cert. denied*, 434 U.S. 1033 [1978]; *United States* v. *Jones*, 527 F. 2d 817, 822 [D.C. Cir. 1975]; *Martin* v. *Rose*, 481 F.2d 658 [6th Cir. 1973], *cert. denied*, 414 U.S. 876 [1973]; *People* v. *Abbamonte*, 43 N.Y. 2d 74, 371 N.E.2d 485, 400 N.Y.S. 2d 766 [1977]).

It follows that when subsequent to the reversal of petitioners' federal convictions by the United States Court of Appeals for the Second Circuit (486 F. 2d 670 [2nd Cir. 1973]), the newly created office of the Special State Prosecutor sought an indictment under appropriate New York Penal Law provisions, petitioners were being prosecuted for the first time by an independent sovereign. As a consequence, aside from the lack of state statutory defenses to the fact of such a second prosecution (*Matter of Klein* v. *Murtagh*, 44 A.D. 2d 465, 355 N.Y.S.2d 622 [2nd Dept. 1974], *aff'd*, 34 N.Y. 2d 988, 318 N.E.2d 606, 360 N.Y.S.2d 416 [1974]; New York Criminal Procedure Law §40.20 [2] [f]

[McKinney 1971]), petitioners were also without recourse to the Fifth and Fourteenth Amendments of the United States Constitution (*Bartkus* v. *Illinois, supra*).*

Moreover, to the extent that petitioners question the constitutionality of subparagraph (f) of New York Criminal Procedure Law §40.20 (2), they merely raise anew the same unmeritorious point (see Petition at pp. 35-37)—i.e., that successive prosecutions are not constitutionally sanctioned. Again, however, in light of *Bartkus,* as well as the rulings of the New York courts that notwithstanding the *statutory* rejection of dual sovereignty principles in that State, the Legislature was still free to, and in fact did, provide for instances when successive federal/state prosecutions would be allowed, the question is strictly one of state law involving non-constitutional considerations.** It is therefore not within the office of a petition for a writ of certiorari.

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* Interestingly, since the Second Circuit never held that the evidence was insufficient to support that part of 18 USC §1952 which embodied the state offense of bribe receiving (New York Penal Law former §200.10 [McKinney 1967]), petitioners were never found to have been insufficiently proven guilty of the essential charge *sub judice* (compare to *Burks* v. *United States,* 437 U.S. 1 [1978]). The appeal and reversal in *United States* v. *Archer, vis a vis* the subsequent state prosecution, therefore, is akin to that situation when a defendant appeals a conviction with the judgment being later reversed because of compelling trial errors unrelated to the issue of evidentiary sufficiency, and where a new trial is then ordered. Such a case has never been held to run afoul of the Constitution (see *United States* v. *Ball,* 163 U.S. 662, 672 [1896]).

** Petitioners' equal protection argument with respect to sub-paragraph (f) is likewise unavailing. The New York Legislature undoubtedly rationalized that a defendant *convicted* in federal court but later vindicated on appeal by virtue of a statutory element not indigenous to the parallel state penal provision, should be liable for a separate prosecution under the state statute. On the other hand, a defendant earlier *acquitted* in federal court is in a different footing since there is no way to perceive the precise reason for the jury's verdict—a reason which might be totally unrelated to the fact of the additional federal statutory element.

II

The actions of the government agents, having been found by the courts of New York, subsequent to a hearing, to have been lawful and proper, in no way approached the level of "outrageousness" which would prompt this Court to invoke the "due process" defense expressly reserved in *United States* v. *Russell* (411 U.S. 423) and *Hampton* v. *United States* (425 U.S. 484).

The pre-eminent issue in this case, which has accorded it a degree of notoriety ever since the original determination* of the Second Circuit in *United States* v. *Archer*, 486 F.2d 670 (2nd Cir. 1973), is whether the conduct of the federal investigtors, in creating a "crime" which petitioner Archer was twice convicted of "fixing" in his capacity of Assistant District Attorney in charge of the Indictment Bureau of the Queens County, New York, District Attorney's office, was so offensive to the standards of due process as to mandate dismissal of the underlying charges. Although, concededly, a majority of this court has articulated

* The Second Circuit's decision criticizing the acts of the government was clearly muted upon the United States' petition for reargument when the facts of the investigation were elucidated for the first time (see 486 F.2d at 683, 683 n. 1; see also p. 7a of Petitioner's appendix). Petitioner Archer, however, has elected to omit from his appendix the Circuit Court's further reminations in this regard where in such appendix that court's original opinion *alone* is reproduced. In his argument, he has likewise totally disregarded not only the fact of his offense but the decision of the Appellate Division which was issued upon his appeal from the judgment of conviction herein. In its opinion, that court, addressing itself to the exhaustive facts adduced at the "investigative technique" hearing held prior to trial—*facts not at any time advanced before the Second Circuit upon appeal from the federal judgment of conviction*, concluded that, as now fully developed, the record clearly supports the view that the federal investigators proceeded in good faith and with careful regard for all judicial institutions.

the view that such a defense might be available under uniquely "outrageous" circumstances (see *United States* v. *Russell,* 411 U.S. 423, 431-432 [1973]; *Hampton* v. *United States,* 425 U.S. 484, 495, n. 7 [1976] [Powell, J., concurring]), it will be clear from even a cursory understanding of what would be involved in such an instance that the *Archer* case does not fall within its purview.

A.

In *United States* v. *Russell, supra,* which was concerned with the alleged entrapment of that defendant by the federal agents involved, this court, while holding that such defense is unavailable where the accused's predisposition has been established, asserted that,

> [w]hile we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial process, *cf. Rochin* v. *California,* 342 U.S. 165 (1952), the instant case is distinctly not of that breed (411 U.S. at 431-432).

Thereafter, in *Hampton* v. *United States, supra,* at least five Justices of the court reasserted that view as articulated by Justice Powell in his concurring opinion. Said Justice Powell:

> I am unwilling to conclude that an analysis other than one limited to predisposition would never be appropriate under due process principles (425 U.S. at 493).*

* Justice Powell's reference to *United States* v. *Archer* in this regard, as an example of a non-contraband offense situation which the court has not yet considered in the face of such a due process argument, should be quickly placed in its proper perspective. As

(footnote continued on next page)

Indeed, such a "fundamental fairness" defense (see *United States* v. *Russell, supra,* 411 U.S. at 432, quoting *Kinsella* v. *United States ex rel. Singleton,* 361 U.S. 234 [1960]) has been recognized in a multitude of cases considered in light of *Russell* and *Hampton* by the various Circuit Courts of Appeals, as involving a pure question of law, which, when appropriately raised, is to be addressed to the judge presiding. See *Wager* v. *Pro,* 603 F.2d 1005 (D.C. Cir. 1979); *United States* v. *Corcione,** 592 F.2d 111 (2nd Cir. 1979), *cert denied,* 99 S. Ct. 1545, 99 S. Ct. 1801; *United States* v. *Burkley,* 591 F.2d 903, 911 (D.C. Cir. 1978), *cert denied,* 440 U.S. 966; *United States* v. *Twigg,*** 588 F.2d 373 (3rd Cir. 1978); *United States* v. *Szycher,* 585 F.2d 443 (10th Cir. 1978); *United States* v. *Perrin,* 580 F.2d 730, 737 (5th Cir. 1978), *cert. denied,* 100 S. Ct. 520; *United States* v. *Prairie,* 572 F.2d 1316 (9th Cir. 1978); *United States* v.

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noted earlier, and as realized by the New York courts, the Second Circuit in *Archer* did not have the benefit of the more elaborate facts later revealed in the "technique" hearing conducted during the course of the subsequent state proceedings. Accordingly, the *Archer* opinion, as originally written by Judge Friendly, provides only a limited picture—if accurate at all—of the governmental constraints that were exercised herein and which are now *sub judice* for the first time. Justice Powell's reference therefore should be realized for what it is: a citation to a case which, unbeknownst to the court deciding it, was depictive of a much more elaborate scenario and hence, a depiction not amounting to a complete picture of the relevant events.

* Judge Mansfield's discussion of *United States* v. *Archer in Corcione* (see 592 F.2d at 115-116), appears to ignore the Second Circuit's own reassessment of that case upon reargument (see 486 F.2d at 683), and was written six months before the Appellate Division, in *People* v. *Archer* (68 A.D. 2d 441, 417 N.Y.S. 2d 507), elucidated the further facts that were adduced at the "technique" hearing upon the state prosecution.

** The *Twigg* case appears to be the only post-*Hampton* decision which actually reversed a judgment of conviction upon pure due process grounds. There, the court predicated its disposition on the fact that the government agents had actually created and nurtured the crimes of which the defendant was convicted.

Johnson, 565 F.2d 179 (1st Cir. 1977), *cert denied,* 434 U.S. 1075; *United States* v. *Leja,* 563 F.2d 244 (6th Cir. 1977), *cert denied,* 434 U.S. 1074; *United States* v. *Garcia,* 562 F.2d 411, 415 (7th Cir. 1977); *United States* v. *Graves,* 556 F.2d 1319 (5th Cir. 1977), *cert denied,* 435 U.S. 923; *United States* v. *Steinberg,* 551 F.2d 510 (2nd Cir. 1977); *United States* v. *Quinn,* 543 F.2d 640, 648 (8th Cir. 1976); *United States* v. *Gonzalez,* 539 F.2d 1238 (9th Cir. 1976); *United States* v. *Smith,* 538 F.2d 1359 (9th Cir. 1976); *United States* v. *Gonzalez-Benitez,* 537 F.2d 1051, 1055 (9th Cir. 1976), *cert denied,* 429 U.S. 923; *United States* v. *Reifsteck,* 535 F.2d 1030, 1034-1035 (8th Cir. 1976); and *United States* v. *Campa,* 474 F. Supp. 507 (S.D. Fla. 1979). *Cf. People* v. *Isaacson,* 44 N.Y.2d 511, 378 N.E.2d 78, 406 N.Y.S.2d 714 (1978), which accepted a similar defense, upon appropriately delineated guidelines, under the New York State Constitution.

In assessing the viability of such a due process claim, this court in *Hampton* effectively outlined the focus of attention. As stated by Justice Rhenquist,

> [t]he limitations of the Due Process clause of the Ffth Amendment come into play only when the Government activity in question violates some protected right of the *defendant* (411 U.S. at 490; emphasis in original).

See also *United States* v. *Graves, supra,* at 1325; *United States* v. *Campa, supra,* at 509.

Further, the applicability of such a drastic remedy as dismissal of all charges, even by Justice Powell's analysis, is confined to that "rare" situation when police involvement in crime reaches a "demonstrable level of outrageousness" (see 425 U.S. at 495, n. 7, Powell, J., concurring; *cf.*

Rochin v. *California, supra*). And the defense has been accepted as cognizable only in that situation, aside from where the authorities participate in the *precise* crime of which the accused is guilty, where the defendant was not the one who conceived of and fostered the criminality, but where in fact the investigators have done so on their own initiative (compare *United States* v. *Twigg, supra* to *United States* v. *Leja, supra* and *United States* v. *Smith, supra; cf. Hampton* v. *United States, supra,* 425 U.S. at 482, n. 2, Powell, J., concurring).

B.

By no view, could the "rare" "level of outrageousness" contemplated by Justice Powell be realized under the now fully developed facts in this case (compare *People* v. *Archer,* 68 A.D. 2d 441, 417 N.Y.S. 2d 507 [2nd Dept. 1979] to *United States* v. *Archer,* 486 F.2d 670 [2nd Cir. 1973]).

First of all, even petitioner Archer does not accuse the federal authorities of having perpetrated the *same* crime which he has now twice been convicted of committing (and a crime which he completely ignored throughout the state appellate process and in his petition). Hence, although petitioner has charged the investigators with having committed *inter alia,* perjury and offering false instruments for filing—which, of course, is belied by the evidence adduced at the "technique" hearing herein (4a-6a)—he certainly has not claimed that they committed *bribe receiving.*

The reason is simple. It cannot be disputed, were Archer to have been willing to address the substantive facts of his crime, that he and his confederates conceived of the plan to fix the "case" on their own. To be sure, the evi-

dence adduced at the hearing and the trial conclusively demonstrates that the federal undercover agent only suggested that it would be worth his while were "his case" not to proceed. Thus, only the opportunity was created by the investigators. The fact of a bribe, the amount of the bribe, the grand jury as a vehicle for improperly terminating the case as well as the story to be related to that forum, were all suggested by petitioner Archer and his co-conspirators in furtherance of the conspiracy. Hence, as the Appellate Division found, the government did not manufacture a crime that otherwise would not likely have occurred (9a).

Not unlike in *Russell*, therefore, and aside from any issue of predisposition,*

> [n]or does it seem particularly desirable for the law to grant complete immunity from prosecution to one who himself planned to commit a crime, and then committed it, simply because government undercover agents subjected him to inducements which might have seduced a hypothetical individual who was not so predisposed. (411 U.S. at 434).

Cf. United States v. *Twigg, supra.*

Secondly, neither petitioner has pointed to any cognizable right which he possessed that was violated by the federal authorities. For the defense to be invokable in the first instance, that is clearly a pre-requisite (see *Hampton* v. *United States, supra,* 425 U.S. at 490).

To the contrary, here, in the face of far reaching allegations of corruption directly implicating the Queens County

* Both sides agree that no defense of entrapment is cognizable on this record.

District Attorney's office—hence the then* unavailability of any appropriate state prosecutorial agency—and in view of the fact that the Knapp Commission's pre-eminent informant would only work with federal prosecutors, the Commission members had no choice but to request a federal investigation. In this regard, the record of the "technique" hearing clearly demonstrates the depth of the allegations which required prosecutorial attention and with which the United States Attorney was confronted.

In pursuing their mandate, the investigators proceeded with great circumspection and with high regard not only for the rights of potential targets but for the very institutions which they were charged with cleansing. The following, therefore, even for the limited purpose of this petition, must be realized:

1. Left undiscussed by the Circuit Court in *Archer*, was the fact that before the plan was even contemplated, there was conscientious consideration given to other alternatives including the use of an existing defendant or a government informant. For purposes of ensuring subsequent credibility and sufficiently reliable corroboration, however, both options had to be eschewed.

2. Also unknown to Judge Friendly in *Archer* was that the authorities had given very careful consideration to the manner in which the "offense" was to be carried out, i.e., the need for a simple weapons possession offense which would involve a minimum of personnel and misrepresentations as well as the avoidance of narcotics substances, and the need to have the "crime" actually acted out so that the "arresting" officer in swearing out a felony complaint would in fact be re-

* The office of the Special Prosecutor was not created until later.

calling that which literally occurred. The "falsity" of the "charge" alluded to in *Archer* therefore was thus meticulously avoided.

3. As in fact observed upon reconsideration of the *Archer* appeal, the Police Commissioner of the City of New York was completely included in the mechanics of the plan to the point of providing the "arresting" officer. The "lying" to the police which was referred to in the original *Archer* opinion therefore simply did not occur.

4. Specificially unrealized by the *Archer* court was that the only misrepresentation made at the government's inititative to a member of the Judiciary—who, obviously, along with the District Attorney, could not have been informed of the plan, since all were under possible suspicion—was the false pedigree of the "arrestee" who, *without taking any oath*, gave information relevant to his identity as "Salvatore Barone." Also, cash bail was posted in order to further minimize resort to falsification. The identity of the agent who posted the bail was likewise not related under oath.

5. Not at all emphasized by the *Archer* court, and as noted earlier, was that Archer and his cohorts themselves suggested the type of fix and the precise amount of the required money—the agent merely having said that it was worth it to him not to go to court.

6. Unlike the *Archer* court's observations which implied that the government "concocted" the story for the grand jury, it is clear that Archer's co-conspirators upon his behind the scenes request for a testimonial explanation for the "offense," manufactured the scenario to be related to the grand jury.

7. The reality of the pending grand jury presentation, neither foreseen nor contemplated by the investigators and not appreciated or realized by the Second Circuit, had given rise to a serious deliberative process

which the United States Attorney, in view of his respect for the sanctity of that body, felt obliged to undertake. It was only after deciding that he had a public duty to ascertain the truth of the allegations concerning the chief of the Queens County District Attorney's Indictment bureau that he opted to proceed.

8. Likewise not pointed out by Judge Friendly was the fact that the federal agent (as "Barone") was carefully instructed by his superiors that the only story to be given to the grand jurors was that created by the defendants themselves, and that under no circumstances was a recording or transmitting device to be utilized during the presentation.

9. As was only later observed by the *Archer* court, and although neither his approval nor disapproval was solicited, the U.S. Attorney had seen fit to personally inform former Chief Judge Stanley Fuld as to the fact of the plan—clearly not indicative of a cavalier attitude to the sensitivity of the undertaking.

It follows that no question is raised by the petitions which prior decisions of this court have not adequately treated in a manner consistent with the courts of New York in this case. As a consequence, the applications are unmeritorious, the case not being in need of further review. See Rules of the Supreme Court of the United States, Rule 17.1[c].

III

Petitioners' state indictment was not unnecessarily delayed.

It is petitioners' final suggestion that the original investigation was a joint federal/state undertaking and that the state indictment was first filed almost a year after their convictions and about six and a half months after the

United States Court of Appeals threw out their case. They argue therefore that their defense suffered from the denial of a speedy trial, or alternatively from extensive pre-indictment delay, citing in his latter regard, among other cases, *United States* v. *Marion,* 404 U.S. 307 (1971) and *United States* v. *Lovasco,* 431 U.S. 783 (1977). Petitioners are wrong, both as to the nature of the investigation herein and their computation of time with regard to any pre-indictment delay before the state grand jury returned a true bill. As such they raise no claim meriting review.

Indisputably, it was the finding of the trial court, which gave careful consideration to petitioner Archer's arguments, that this was not a joint federal/state undertaking but simply a federal investigation conducted at the behest of the Knapp Commission, albeit with local cooperation in the form of the Police Commissioner and his subordinate. The arrest herein was thus simply a federal matter with the state proceedings not having been even contemplated at the time.

The focal point of discussion, therefore, should be that period leading up to November of 1973, the time when the state indictment was first filed.*

Concerning this single issue of pre-indictment delay, a concept essentially predicated on the dictates of due process, this court has, for the most part, addressed itself to the

* Importantly, at the time of the federal indictment, there was no state prosecutor with jurisdiction over Queens County who could even have handled a prosecution, the Special Prosecutor's office not yet having been created and the Queens County District Attorney, aside from being in a conflict situation, himself having been under investigation. Petitioners moreover have never made any showing of facts that would have countered the trial court's assessment as to the federal nature of the investigation.

question of the extent of the appropriate statute of limitations and whether any prejudice has inured to the ability of the defendant to properly answer the charges (see *Marion, supra; Lovasco, supra*). Even so, however, a determination made in good faith to defer commencement of the prosecution for further investigation or for other sufficient reasons, will not deprive the defendant of due process of law even though the delay may cause some prejudice to the defense (*United States* v. *Lovasco, supra*).

In the matter at hand, any delay cognizable is clearly attributable to such a good faith motivation.

As seen, the federal indictment was filed in or about July of 1972. At that time no state agency with jurisdiction over the substantive offenses in Queens County was capable of prosecuting petitioners. Thereafter, petitioners went to trial in federal court and were convicted in or about January of 1973. Importantly, from that point when jeopardy attached in the federal trial, i.e., after the swearing of the jury (*Crist* v. *Bretz,* 437 U.S. 28 [1978]), no state prosecutorial agency, even were any available and so disposed, could have properly prosecuted the matter in view of the "same transaction" rule which prevails in New York (New York Criminal Procedure Law §40.20[2] [McKinney, 1971]). This was absolutely the case until that time when the United States Court of Appeals determined that the convictions had to be aside for the single reason of ". . . insufficiency of evidence to establish some element of [the federal offense] which is not an element . . ." of the state offense with which petitioners were ultimately charged (New York Criminal Procedure Law §40.20[2][f] [McKinney, 1971]). That did not occur until July 12, 1973.

Furthermore, from that point there was not a six and a half month hiatus until the subsequent state indictment as petitioners suggest—as innocuous as that itself would have been—but only a two-month lapse of time. This is because subsequent to the Circuit Court's original decision, a motion for re-argument was interposed by the United States Attorney. The Court did not decide that application until September 26. It follows that the only period of time of any consequence is that space from September 26 until the filing of the state charges in November, 1973.

Surely, no prejudice inured to petitioners during this two-month interval (*Marion, supra; Lovasco, supra*). Indeed, as observed by the trial court, petitioner Archer had already prepared for a defense—that offered at the federal trial—and thus could not have been hampered in mapping plans for a second.

Petitioner Archer's complaint that he was "lulled into a false sense of security by the fact that he was never indicted by the state authorities until after his dismissal in the United States Court of Appeals . . ." (Petition at P. 53), is thus simply belied by the controlling considerations enumerated above. Even if so, however—which we would dispute— it is inconsequential for purposes of due process. No real prejudice having resulted in a two-month delay—which itself is undoubtedly self-explanatory since the state was certainly entitled to prepare its grand jury presentation—petitioners' rights were in way compromised.

Accordingly, here again, no cognizable issue is presented that warrants the granting of certiorari.

Conclusion

The petitions for writs of certiorari should be denied.

Respectfully submitted,

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